THE

CAROLINA LAW REPOSITORY.

Vol. I. MARCH, 1814. No. 3.

CONTENTS.

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LEGAL BIOGRAPHY.

ACCOUNT OF WILLIAM EARL OF MANSFIELD.

" The ancient custom of transmitting to posterity the actions and manners of famous men, has not been neglected in the present age, though incurious of its own affairs, whenever any exalted and noble degree of virtue has broken through that malignity and false estimation of merit, by which great and small states are equally infested."[a] Such is the observation of Tacitus, which, being founded both in truth and justice, will be equally applicable to the present times. Of those who have deserved to be held in reverence by mankind, for great talents exerted successfully for the advantage of the public, during a series of years, no one stands higher than Lord MANSFIELD; one, by whose indefatigable industry the jurisprudence of his country has been improved and

[a] "Clarorum virorum facta moresque tradere antiquitus usitatum, " ne nostris quidem temporibus, quanquam incuriosa suorum, ætas " omisit, quotiens magna aliqua ac nobilis virtus vicit ac supergres- " sa est vitium parvis magnisque civitatibus commune, ignorantiam " recti et invidiam."—*Julii Agricolæ Vita.*

rendered respectable; who had the good fortune to live long enough to see the malignity of party extinguished, and to hear the general voice uniting to bear testimony to his worth and abilities.

WILLIAM MURRAY, Earl of Mansfield, was the fourth son of David, Earl of Stormont, a nobleman who is not recorded to have possessed any extraordinary endowments of the mind or superior powers of understanding, and, but for his attachment to the interests of the Pretender, would now have only been known from the celebrity of his son, the subject of our present attention.[a] Lord Mansfield was born on the 2d day of March, 1705, at Perth in the kingdom of Scotland.[b] His residence there was but of short duration, being brought to London at the age of three years, which will account for his having contracted none of the peculiarities of the dialect of his country. It is to the honor of the Westminster School that it can number so great a character amongst those who

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[a] In a memorial printed in "The Secret History of Col. Hooke's "Negociations in Scotland in favor of the Pretender, in 1707," 8vo. 1760, p. 65, he is thus described: "Lord Stormont is turned "of forty, and he is of the house of Murray. He is rich and pow- "erful on the frontiers of England and in the middle of Scotland. "He is a man of great resolution, strict probity and uncommon "presence of mind." It appears also, from the same memorial, that he had considerable weight with the malcontents in his native kingdom.

[b] We have heard it said that he was born in England, and that the registry of his admission into Christ College places his birth at Bath. On enquiry, we find this to be true, as will appear from the following extract from the Register: "(Copy)—Trin.Term, "1723, Jun. 18. Æd. Xti. Gul. Murray, 18. David f. Civ. Bath— "C. Som. V. Com. fil.—T. Wenman, C. A." Sir Wm. Blackstone once mentioned the circumstance to Lord Mansfield, who said the mistake might perhaps have originated from the broad pronunciation of the person who gave in his name to the Registrer.

have received their education there. At the age of fourteen he was admitted into that seminary as King's Scholar.---- "During the time of his being at school," says one who was contemporary with him, "he gave early proofs of his uncommon abilities, not so much in his poetry as in his other "exercises, and particularly in his declamations, which were "sure tokens and prognostics of that eloquence which grew into such maturity and perfection at the Bar and in both houses of Parliament." At the election in May, 1723, he stood first on the list of those gentlemen who were sent to Oxford. He was entered in Christ Church, June 18th, in that year. In the year 1727, he had taken the degree of B. A. and on the death of King George I. was among those of the University who composed verses on that event. On the 26th day of June, 1730, he took the degree of M. A. and probably soon after left the University. Before he devoted himself to business, he made the tour of Europe, and on his return became a member of the Society of Lincoln's Inn, and was in due time called to the Bar.

The fortune of Lord Mansfield at this period, we believe, was rather slender, but he soon supplied any deficiency in that respect by his application and abilities. He does not appear to have proceeded in his profession in the way then usually adopted, of laboring in the chambers of a special pleader, or copying (to use the words of Blackstone) the trash of an attorney's office; but being blessed with the powers of oratory in their highest perfection, and having soon an opportunity of displaying them, he very early acquired the notice of the Chancellor and the Judges, as well as the confidence of inferior practicers. How much he was regarded in the House of Lords, Mr. Pope's well known couplet proves:

> "Graced, as thou art, with all the power of words,
> "So known, so honored at the House of Lords."

The graces of his elocution, however, produced their usual effect with a certain class of people, who would not believe

that such bright talents could associate with the more solid attainments of the law, or that a man of genius and vivacity could be a profound lawyer. As Mr. Pope observed at that time,

> "The Temple late two brother Serjeants saw,
> "Who deemed each other oracles of Law;
> "With equal talents these congenial souls,
> "One lull'd th' Exchequer, and one stunn'd the Rolls.
> "Each had a gravity would make you split,
> "And shook his head at Murray as a wit."

It is remarkable that this ridiculous prejudice accompanied Lord Mansfield to the end of his judicial life, in spite of daily proofs exhibited in the Court of King's Bench and in the House of Lords, of very profound knowledge of the abstrusest points of jurisprudence. Lord Chesterfield has given his sanction to this unfounded opinion: In a letter to his son, dated Feb. 12, 1754, he says, "The present Solicitor-"General Murray, has less law than many lawyers, but he "has more practice than any, merely on account of his elo-"quence, of which he has a never-failing stream."

In the outset of Lord Mansfield's life, it will be less surprizing that a notion should have been entertained of his addicting himself to the pursuit of belles lettres too much, when the regard shewn to him by Mr. Pope, who despotically ruled the regions of literature at that period, is considered. That great poet seemed to entertain a particular affection for our young lawyer, and was eager to shew him marks of his regard. He addressed to him his Imitation of the 6th Epistle of the 1st Book of Horace. Bishop Warburton says (in his Life of Pope, pag. 401) "Mr. Pope had all "the warmth of affection for this great lawyer; and, indeed, "no man ever more deserved to have a poet for his friend: "In the obtaining of which, as neither vanity, party nor fear "had a share, so he supported his title to it by all the offices "of a generous and true friendship."

Mr. Ruffhead also declares that Mr. Pope had at one time an intention of leaving his house at Twickenham to his friend Mr. Murray, whose growing fame and rising station, which would render him superior to such a mansion, alone prevented him from carrying into execution. In the fourth book of the Dunciad he says, speaking of those whose poetical pursuits were diverted by law or politics—

> "How sweet an Ovid, Murray was our boast!
> "How many Martials were in Pultney lost!"

And in his Imitation of the 1st Ode of the 4th Book of Horace, he again compliments him in the following lines addressed to Venus:

> "To number five[a] direct your doves;
> There spread round Murray all your blooming loves.
> Noble and young he strikes the heart;
> Equal the injured to defend,
> With every sprightly, every decent part,
> To charm the mistress or to fix the friend.
> He, with an hundred arts refined,
> Shall stretch thy conquests over half thy kind;
> To him each rival shall submit—
> Make but his riches equal to his wit,
> Then shall thy form the marble grace,
> (Thy Grecian form) and Chloe lend her face;
> His house embosom'd in the grove,
> Sacred to social life and love,
> Shall glitter o'er the pendent green,
> Where Thames reflects the visionary scene;
> Thither the silver sounding lyres
> Shall call the smiling Loves and young Desires;
> There every Grace and Muse shall throng,
> Exalt the dance and animate the song;
> There Youths and Nymphs in concert gay,
> Shall hail the rising, close the parting day."

To conclude, Mr. Pope continued to shew his regard, even in the last act of his life, by appointing him one of his executors.

[a] The No. of Lord M.'s chambers.

Whatever propensities Lord Mansfield might have to polite literature, he did not permit them to divert his attention from his profession. He soon distinguished himself in an extraordiuary manner, as may be seen by those who are conversant with, or chuse to refer to the Books of Reports. In the year 1736, the murder of Captain Porteous by a mob in Edinburgh, after he had been reprieved, occasioned a censure to fall on that town, and a bill of pains and penalties was brought into Parliament against the Lord Provost and the city, which after various modifications and a firm and unabated opposition in every stage of its progress, passed into a law. In both Houses, Mr. Murray was employed as an advocate, and so much to the satisfaction of his clients, that afterwards, in Septemb. 1743, he was presented with the freedom of Edinburgh in a gold box, professedly, as it was declared, for his signal services, by hisspeeches to both Houses of Parliament, in the conduct of that business. Before this period, we believe, Mr. Murray could be considered only in his novi iate at the bar.

On the 20th of November, 1738, he married Lady Elizabeth Finch, daughter of the Earl of Winchelsea, and in the month of November, 1742, was appointed Solicitor-General in the place of Sir John Strange, who resigned. [On this occasion, a doggrel poem was published by one Morgan, a person then at the bar, entitled "The Causidicade," in which all the principal lawyers were supposed to urge their respective claims to the post; at the conclusion of which it is said,

> Then Murray, prepared with a fine panegyric,
> In praise of himself, would have spoke it like Garrick,
> But the President, stopping him, said, "As in truth
> "Your worth and your praise is in every one's mouth,
> "'Tis needless to urge what's notoriously known,
> "The office, by merit, is yours, all must own;
> "The voice of the people approves of the thing,
> "Concurring with that of the Court and the King."]

He likewise was chosen to represent the town of Borough-

bridge in Parliament, for which he was also returned in 1774 and 1754. In the month of March, 1746-'7, he was appointed one of the Managers for the impeachment of Lord Lovat by the House of Commons, and it fell to his lot to observe on the evidence previous to the Lords giving their judgment. This task he executed with so much candor, moderation and gentleman-like propriety (so different, we are sorry to add, from what has since been observed in the same place) that Lord Talbot, at the conclusion of his speech, paid him the following compliment: "The abilities of the "learned Manager who just now spoke, never appeared with "greater splendor than at this very hour, when his candor "and humanity has been joined to those great abilities that "have already made him so conspicuous, that I hope one "day to see him add lustre to the dignity of the first civil "employment in this nation."

Lord Lovat himself also bore testimony to the abilities of his adversary: "I have thought myself," says his Lordship, "very much loaded by *one* Murray, [one of the wit-"nesses against him] whom your Lordships know was the "bitterest evidence there was against me. I have since "suffered by another Mr. Murray, who I must say with "pleasure, is an honor to his country, and whose eloquence "and learning is much beyond what is to be expressed by "an ignorant man like me. I heard him with pleasure, "though it was against me. I have the honor to be his "relation, though perhaps he neither knows nor values it. "I wish that his being born in the North may not hinder "him from the preferment which his merit and learning "deserve."

After the torrents of invective we have lately heard, to the reproach of the national character, poured from the same place, it may not be improper, on the present occasion, to insert the conclusion of Mr. Murray's speech:

"I have said thus much to shew, that the noble Lord's "alleging that he wants assistance, or has not his witnesses, "may be of more service to him than any assistance or wit- "nesses he could have; and to shew that the Commons have "not taken upon themselves this prosecution to lay the noble "Lord at the bar under any disadvantages in his defence. "From the witnesses who have been examined, the case "must appear to your Lordships such as no advantages could "have enabled him to get the better of. There are many "circumstances which induced them to single out this pro- "secution—many circumstances of a public, many of a pe- "culiar nature. I am almost tempted to mention some of "them; but, in part, they have occurred to your Lordships "in the course of the examination; and I refrain, lest I "should drop any thing which might tend to inflame. Every "thing of that sort has by every body been carefully avoided "upon this occasion. That *Ciceronian eloquence*, as he calls "it, from principles of justice and humanity, has not been "used against him. Every gentleman who has spoke in this "trial, has made it a rule to himself to urge nothing against "the prisoner but plain facts and positive evidence, without "aggravation. They have addressed themselves to your "judgment and not to your passions. I dare say your "Lordships have observed, that though the evidence given "consists of a variety of facts, some more directly affecting "the noble Lord, others less, and some perhaps not affect- "ing him at all, neither in the summing up the evidence, "nor in what I have now troubled your Lordships with, "has any thing been mentioned as direct evidence against "him which is not so. Circumstances which only tend to "corroborate, have been mentioned in that light; and evi- "dence which no ways affects him, has not been repeated or "observed upon at all. My Lords, the whole is now be- "fore your Lordships; it is your province to make the "conclusion which ought be drawn from the premises."

During the time Mr. Murray continued in office, he supported with great ability the administration with which he was connected; and, as may be concluded rendered himself obnoxious to those who were in opposition. The principles of his family, in which he may be presumed to have been educated, have been already noticed; and therefore it will create no surprize that in the confidence of friendly intercourse, or in the moment of exhiliration, he should have uttered sentiments which youth and inexperience only could palliate. In the year 1753, accident brought forward a charge againt him, which we shall relate in the words of Lord Melcombe's Diary:

"Messrs. Fosset (Fawcett) Murray and Stone were much "acquainted, if not school-fellows, in early life. Their "fortune led them different ways; Fawcett's was to be a "ccuntry lawyer and Recorder of Newcastle. Johnson, "now Bishop of Gloucester, was one of their associates.— "On the day the King's birth-day was kept, they dined at "the Dean of Durham's, at Durham, this Fawcett, Lord "Ravensworth, Major Davison, and one or two more, who "retired after dinner into another room. The conversation "turning upon the late Bishop of Gloucester's preferments, "it was ssked who was to have his prebend of Durham— "The Dean said, that the last news from London was, that "Dr. Johnson was to have it. Fawcett said, he was glad "that Johnson got off so well, for he remembered him a Ja- "cobite several years ago; and that he used to be with a "relation of his who was very disaffected, one Vernon,[a] a "mercer, where the Pretender's health was frequent drunk. "This passing among a few familiar acquaintances, was "thought no more of at the time: It spread, however, so much "in the North, (how I have never heard,) and reached town

[a] This Vernon is said to have devised an estate to Mr. Murray, which is still in the possession of the family.

" in such a manner, that Mr. Pelham thought it necessary to
" desire Mr. Vane, who was a friend to Fawcett, and who
" employed him in his business, to write to Fawcett to know
" if he had said this of Johnson, and if he had if it was true.
" This letter was written on the 9th of January; it came
" to Newcastle the Friday following: Fawcett was much
" surprized; but the post going out in a few hours after its
" arrival, he immediately acknowledged the letter by a long
" but not very explicit answer. This Friday happened to be
" the club day of the neighboring gentlemen at Newcastle.
" —As soon as Lord Ravensworth, who was the patron
" and employer of Fawcett, came to town, Fawcett ac-
" quainted him with the extraordinary letter he had received.
" He told him that he had already answered it, and being
" asked to shew the copy, said he kept none; but desired
" Lord R. to recollect if he held such a conversation at the
" Deanery on the day appointed for the birth-day. Ravens-
" worth recollected nothing at all of it: They went to the
" club together, and Ravensworth went the next morning to
" see his mother in the neighborhood, with whom he staid
" till Monday; but this thing of such consequence lying on
" his thoughts, he returned by Newcastle. He and Fawcett
" had another conversation, and in endeavoring to refresh
" each other's memory about this dreadful delinquency of
" Johnson, Fawcett said he could not recollect, at such a
" distance of time, whether Johnson drank those healths, or
" was present at the drinking of them, but that Murray and
" Stone had done both several times. Ravensworth was ex-
" cessively alarmed at this with relation to Stone, on account
" of his office about the Prince; and thus the affair of
" Johnson was quite forgotten and the episode became the
" principal part. There were many more conferences be-
" tween Ravensworth and Fawcett on this subject, in which
" the latter always persisted that Stone and Murray were
" present at the drinking, and did drink those healths. It
" may be observed here, that when he was examined upon

" oath, he swore to the years 1731 or 1732 at latest. Faw-
" cett comes up as usual about his law business, and is exa-
" amined by Messrs. Pelham and Vane, who never had heard
" of Murray[a] or Stone being named ; he is asked, and an-
" swers only with relation to Johnson, never mentioning
" either of the others ; but the love of his country, his king
" and posterity, burned so high in Ravensworth's bosom,
" that he could have no rest till he had discovered this enor-
" mity. Accordingly, when he came to town he acquainted
" the ministry and almost all his great friends with it, and
" insisted upon the removal of Stone. The ministry would
" have slighted it as it deserved, but as he persisted and had
" told so many of it, they could not help laying it before the
" King, who, though he himself slighted it, was advised to
" examine it ; which examination produced this most inju-
" dicious proceeding in Parliament."

This is Lord Melcombe's account ; and the same author informs us, that Mr. Murray, when he heard of the committee being appointed to examine this idle affair, sent a message to the King, humbly to acquaint him, that if he should be called before such a tribunal on so scandalous and injurious an account, he would resign his office and refuse to answer. It came, however, before the House of Lords, on motion of the Duke of Bedford. The debate was long and heavy (says Lord Melcombe) ; the Duke of Bedford's performance moderate enough ; he divided the House, but it was not told, for there went below the bar with him the Earl Harcourt, Lord Townshend, the Bishop of Worcester and Lord Talbot only. The Bishop of Norwich and Lord Harcourt both spoke, not to much purpose ; but neither of them in the least supported the Duke's question. Upon the whole, Lord Melcombe concludes, " It was the worst judg-
" ed, the worst executed, and the worst supported point,
" that ever I saw of so much expectation."

On the advancement of Sir Dudley Ryder to the Chief-Justiceship of the King's Bench, in 1754, Mr. Murray succeeded him as Attorney-General; and on his death, in 1756, again became his successor as Chief-Justice.

On leaving Lincoln's Inn, the late Mr. York, who was a member of the Society, paid him a handsome compliment of regret, in a speech, to which Lord Mansfield returned the following answer (which was taken down in short-hand by the late Counsellor Munckley):

"I am too sensible, Sir, of my undeserving the praises "which you have so elegantly bestowed upon me, to suffer "commendations so delicate as yours to insinuate themselves into my mind; but I have pleasure in that kind "partiality which is the occasion of them; to deserve such "praises is a worthy object of ambition; and from such a "tongue flattery itself is pleasing. If I have had in any "measure success in my profession, it is owing to that great "man who has presided in our highest courts of judicature "the whole time I attended at the bar; it was impossible to "attend him, to sit under him every day, without receiving "some emanation of his light." In this place he enumera- Lord Hardwicke's particular excellencies, and then went on, "The disciples of Socrates, whom I will take the liberty to "to call the great *lawyer* of antiquity, since the first principles of all law are derived from his philosophy, owe "their reputation to your having been the reporters of the "sayings of their master: If we can arrogate nothing to ourselves, we may boast the *school* we were brought up in— "the scholar may glory in his master, and we may challenge "past ages to shew us his equal. My Lord Bacon "had the same extent of thought, and the same strength "of language and expression; but his life had a stain. My "Lord Clarendon had the same abilities, and the same zeal "for the constitution of the country; but the civil war prevented his laying deep the foundations of law; and the

" avocations of politics interrupted the business of the chan-
" cellor. My Lord Somers came the nearest to his charac-
" ter; but his time was short, and envy and faction sullied
" the lustre of his glory. " It is the peculiar felicity of the
" great man I am speaking of, to have presided very near
" twenty years, and to have shone with a splendor that has
" rose superior to faction, and that has subdued envy. I did
" not intend to have said, I should not have said so much on
" this occasion, but that, in this situation, with all that hear
" me, what I say must carry the weight of testimony rather
" than appear the voice of panegyric. For you, Sir, you
" have given great pledges to your country; and large as
" are the expectations of the public concerning you, I dare
" say you will answer them. For the Society, I shall always
" think myself honored by every mark of their esteem, af-
" fection and friendship, and shall desire the continuance of
" it no longer than while I remain zealous for the consti-
" tion of this country, and a friend to the interests of virtue."

Lord Mansfield was sworn Chief-Justice of the King's Bench on the 8th of November, 1756, and took his seat on the Bench on the 11th of the same month. He was called Sergeant, and sworn Chief-Justice before the Lord Chancellor Hardwicke, at his house in Great Ormond Street, in the presence of the three Judges and most of the officers of the King's Bench. The motto on his rings was, " Servate domum." Immediately afterwards the Great Seal was put to a Patent, which had before passed all the proper offices, creating Baron of Mansfield, to him and the heirs male of his body.

As soon as Lord Mansfield was established in the King's Bench, he began to make improvements in the practice of the Court. On the 15th of November, four days after he had taken his seat, he made a very necessary regulation, observing, " Where we have no doubt, we ought not to put
" the parties to the delay and expence of a farther argu-

" ment—nor leave other persons who may be interested in " the determination of a point so general, unnecessarily un- " der the anxiety of suspense." [a]

The anxiety of suspense, from this period, was no longer to be complained of in the Court of King's Bench. The regularity, punctuality and dispatch of the new Chief Justice afforded such general satisfaction, that they, in process of time, drew into that Court most of the causes which could be brought there for determination.

Sir James Burrows says,[b] " I am informed that at the sit- " tings for London and Middlesex only, there are not so few " as eight hundred causes set down a year, and all disposed " of. And though many of them, especially in London, " are of considerable value, there are not more, on an ave- " rage, than between twenty and thirty ever heard of after- " wards, in the shape of special verdicts, special cases, mo- " tions for new trials, or in arrest of judgment. Of a bill " of exceptions there has been *no* instance. (I do not include " judgments upon criminal prosecutions—they are necessa- " ry consequences of the convictions.) My Reports give " but a faint idea of the extent of the whole business which " comes before the Court ; I only report what I think may " be of use as determination or illustration of some matter " of law. I take no notice of the numerous questions of fact " which are heard upon affidavits, the most tedious and irk- " some part of the whole business. I take no notice of a " variety of contestations, which after having been fully " discussed, are decided without difficulty or doubt. I " take no notice of many cases, which turn upon a construc- " tion so peculiar and particular, as not to be likely to form " a precedent for any other case. Yet, notwitstanding this " immensity of business, it is notorious, that in consequence " of method and a few rules which have laid down to prevent " delay (even where the parties themselves would not wil-

[a] 1. Burrow's Reports, p. 5. [b] 4. Burrow's Reports, p. 2583.

" lingly consent to it), nothing now hangs in Court. Upon " the last day of the very last term, if we exclude such mo- " tions of the term as by desire of the parties went over of " course as peremptories, there was not a single matter of " any kind that remained undetermined, excepting one case " relating to the proprietary Lordship of Maryland, which " was professedly postponed on account of the present situa- " tion of America. One might speak to the same effect " concerning the last day of any former term for some years " backward."

The same author also informs us, after reporting the famous case of Perrin and Blake,[a] that it was remarkable that excepting that case, and another in the same volume on Literary Property, there had been, from the 6th of Nov. 1756 to the time of his then present publication (26th May 1776) a final difference in the opinion in the Court in any case, or upon any point whatsoever. It is remarkable, too, (he adds) that, excepting these two cases, no judgment given during the same period, has been reversed, either in the Exchequer Chamber or in Parliament; and even these reversals were with great diversity of opinion among the Judges.

In the next year the ill success of the war then begun occasioned a change in the Administration, and the conflicts of contending parties rendered it impracticable for the Crown, at that juncture, to settle a new Ministry. In order, therefore, to give pause to the violence of both sides, Lord Mansfield was induced to accept the post of Chancellor of the Exchequer on the 9th April 1757, which he held until the 2d of July in the same year. During this interval he employed himself with great success to bring about a coalition, which being effected, produced a series of events which raised the glory of Great Britain to the highest point at which it has ever been seen. In the same year he was offered,

[a] 4. Burrow's Reports, p. 2582.

but refused, the office of Lord High Chancellor; and in November 1758, he was elected a Governor of the Charterhouse in the room of the Duke of Marlborough, then lately deceased.

For several years after this period the tenor of Lord Mansfield's life was marked only with a most sedulous discharge of the duties of his office. In 1760 George II. died, and the new reign commenced with alterations in the Administration, which gave rise to a virulent spirit of opposition, conducted with a degree of violence and asperity never known at any former time. As a friend to the then Administration, Lord Mansfield was marked out for a more than ordinary share of malicious invective.[a]

In 1765 the Bishop of Gloucester (Warburton) republished his Divine Legation of Moses, which he dedicated to Lord Mansfield in an address, wherein, with great ability, he pointed out the rise and progress of the spirit of irreligion and licentiousness which then prevailed. In the course of this narrative (which deserves at this time to be read) he mentions, as a peculiarly fortunate circumstance, "that "while every other part of the community seems to lie *in* "*fæce Romuli*, the administration of public justice in Eng- "land runs as pure as where nearest to its celestial source; "purer than Plato dared venture to conceive it, even in his "feigned Republic."

He proceeds, "now whether we are not to call this the "interposing hand of Providence; for I am sure all history "doth not afford another instance of so much purity and in- "tegrity in one part, co-existing with so much decay and "so many infirmities in the rest; or whether profounder po- "liticians may not be able to discover some hidden force,

[a] See the North Briton, *passim*, and Churchill's Works, particularly the Conclusion of the 4th book of "The Ghost."

" some peculiar virtue in the essential parts, or in the well-
" adapted frame of our excellent Constitution; in either
" case, this singular and shining phenomenon hath afforded
" a cheerful consolation to thinking men amidst all this
" dark aspect from our disorders and distresses."

" But the evil genius of England would not suffer us to
" enjoy it long; for, as if envious of this last support of Go-
" vernment, he hath now instigated his blackest agents to
" the very extent of their malignity; who, after the most vil-
" lainous insults on all other orders and ranks in society,
" have at length proceeded to calumniate even the King's
" Supreme Court of Justice, under its ablest and most un-
" blemished administration. After this, who will not be
" tempted to despair of his country, and say with the good
" old man in the scene,

——— " Ipsa si cupiat salus
" Servare, prorsus non potest hanc
" Familiam!"———

" Athens, indeed, fell by degenerate manners like our own;
" but she fell the later, and with less dishonor, for having
" always kept inviolable that reverence which she, and in-
" deed all Greece, had been long accustomed to pay to her
" august Court of Areopagus. Of this modest reserve,
" amidst a general disorder, we have a striking instance in
" the conduct of one of the principal instruments of her ruin.
" The witty Aristophanes began, as all such instruments do
" (whether wit or without) by deriding Virtue and Religion;
" and this in the brightest exemplar of both, the godlike
" Socrates. The libeller went on to attack all conditions of
" men. He calumniated the Magistrates; he turned the
" Public Assemblies into ridicule; and, with the most beastly
" and blasphemous abuse, outraged their priests, their al-
" tars—nay, the very established Gods themselves. But
" here he stopped; and, unawed by all besides, whether of
" divine or human, he did not dare to cast so much as one

" licentious trait against that venerable judicature; a circum-
" stance which the readers of his witty ribaldry cannot but
" observe with surprise and admiration; not at the poet's
" modesty, for he had none, but at the remaining virtue of
" a debauched and ruined people, who yet would not bear
" to see that clear fountain of justice defiled by the odious
" spawn of buffoons and libellers. Nor was this the only
" consolation which Athens had in her calamities. Its pride
" was flattered in its falling by apostate wits of the first
" order; while the agents of public mischief amongst us, with
" the hoarse notes and blunt pens of ballad makers, not only
" accelerate our ruin, but accumulate our disgraces—wretch-
" es, the contemptible for their parts, the most infernal for
" their manners.

" Such characters rarely fail to perform much of the task
" for which they were sent: but never without finding their
" labor ill repaid, even by those in whose service it was
" employed. *That glory of the Priesthood* left the world he
" had so nobly benefited with this tender complaint: " Hoc
" tempore nihil scribi aut *agi* potest quod non pateat *calum-*
" *niæ*, nec raro fit, ut dum agis circumspectissime utrumque
" partem offendas, quum in utraque sint qui *pariter insani-*
" *ant*." A complaint, alas! to be the motto of every man
" who greatly serves his country."

(To be concluded in our next.)

LAW OPINIONS.

OPINIONS

OF SERGEANT CHESHYRE AND MR. THOMAS REEVE,[a]

On a Case sent from Virginia in 1721.

King Charles II. by letters patent bearing date the 10th of February, 1662, granted 1100 acres of land, situate in the county of Gloucester, in Virginia, to Ralph Green and his heirs forever. This Ralph Green had two sons, Ralph and Robert. Ralph, the eldest, had one son Thomas; Robert, the second, had one son Ralph, who died in the lifetime of his father, and two daughters Elizabeth and Mary.

Ralph Green, the patentee, in his lifetime, made a deed in these words: "Be it known unto all men by these presents, That I Ralph Green, gentleman, of the county of Gloucester, with consent of my wife Elisabeth, do hereby freely give, dispose and alienate, from me, my heirs, administrators or assigns, unto Robert Green my son, the neck of land whereon he now liveth, commonly called by the name of my New Quarter, consisting of about 1150 acres, to him the said Robert Green, his heirs, executors, administrators or assigns; and I do further warrant and affirm this my deed of gift to be of as much force and authenticity as the law can make it, or as any deed or deeds of gift are usually made, it being always provided that the said Robert shall not, without consent of his aforesaid father, solely nor to his own proper use, enjoy possession of the said land till after his father's death. In witness whereof, I have here-

[a] Appointed Lord Chief Justice of the Common Pleas in 1735.

unto set my hand and seal this 8th day of February, 1678-9, in presence of us. Ralph Green. Test. James Dunbar, Leonard Chamberlayne."

In the year 1689, after the death of said Ralph Green, this deed was proved by one of the witnesses, in a Court of Record and according to a custom in that country. But Ralph Green the patentee, after the date of this deed, made his last will and testament in writing, which bears date the 5th day of March in the year 1685-6, and thereby did devise the same lands, in these words: "Item, I give to my son Robert Green, my land he now lives on, during his life, and after his mortality, then to his son Ralph Green and his heirs forever; and in case of their mortality, then to my son Ralph Green and his heirs forever."

Robert Green, the second son, as it seems by this will, was in possession of the land in his father's lifetime, and died in possession; after whose death, his daughters and co-heirs, Mary and Elizabeth entered.

Ralph Green the eldest son, in the year 1693, brought his action of ejectment against the said Mary and Elizabeth, who pleaded in bar, "That Ralph Green their grandfather, long before the time when, &c. was thereof lawfully seized in his demesne as of fee; and being so seized, he the said Ralph, for the natural affection he bore to his son Robert, and to advance him in a marriage then intended, and afterwards solemnized, betwixt the said Robert and one Mary Pritchet, did freely alienate and give the said land wherein, &c. to his said son Robert and his heirs forever, by deed, under his hand and seal, dated the 8th of February, 1678-9; that the said Robert entered, and was thereof seized, and died so seized, leaving the said Mary and Elizabeth, his daughters and co-heirs, entered peaceably, &c. without that, &c. The Plaintiff replied, "That the said Ralph Green was a layman and not lettered; and that the deed was never read to him,

but was declared to him as a deed to take effect only in case he died without making any will; and so the said deed or writing was not the deed of the said Ralph." And thereupon issue was joined, and the jury found for the defendants, That it was the deed of the said Ralph Green.

About the time of this trial, several depositions were taken *in perpetuam rei memoriam*, relating to this deed: And it was proved by one witness (Mrs. Vicars, mother to the said Mary Prichet) that Ralph Green came and called for the said Mary, and said to her, When are my son and you to be married? I have given him a firm deed of gift for the land he lives on. Then Mrs. Vicars asked him if he had acknowledged the deed in court. He answered No, but that he would do it at any time: And she asked him this, because Mr. Pritchet, in his lifetime, had refused his consent to the match, unless Mr. Green would settle some land on his son. And after the marriage, Mr. Green took the said Mary (she being then upon this land) and said, Here is a house and and land for thee; thou shalt never be turned off, for I have given this seat to my son Robert and his heirs forever.

Leonard Chamberlayne, one of the witnesses to the deed, swore that he was by when there was some discourse betwixt Mr. Green and his wife concerning this land; and she desired him to make a deed of gift to son Robert of it; which he then refused, being in drink; but the next morning Mrs. Green told him, she had brought the old man (her husband) into a good humor; and some time after, Mr. Dunbar wrote this deed, and Mr. Green, after it was read, signed, sealed and delivered it as his act and deed, and gave it to his wife to keep for his son Robert.

But another person swore, that Mr. Green, some time in the year 1685, offered so sell him part of his land; upon which the deponent told him he thought he had no right to the land, since he had given it by deed to his son Robert—

He made answer, That deed signified nothing, for he had never acknowledged it in court; and besides, it was such a deed that it could not take effect unless he died without a will, but he had power to give it to whom he pleased by will. The deponent replied, there was no such limitation in the deed, for he had seen it, and it was an absolute deed of gift. Mr. Green then bid this deponent go to his son Robert and fetch the deed; which he did; and when it was read, he said he never intended any such deed, and seemed to be in a great passion with his son; upon which his son told him he knew nothing of it, the thing being transacted without his knowledge.

Robert Green, the son of Ralph the eldest son, brought suit about fourteen years ago.

SERJEANT CHESHYRE's OPINION:

Query 1. Whether this deed be sufficient to pass those lands, and how it shall operate: Or whether, by the proviso, Robert's estate doth not commence in futuro: And if so, whether in that respect the deed be void?

I conceive that this deed may well operate as a covenant to stand seized to the use of the father for life, and after his decease to Robert his son and his heirs; and since it can have no effectual operation any other way than by way of use, the Judges (where there is a good consideration, as here of a younger son) have strained to give the deed an useful operation, and not to make it void, as a common law conveyance for want of a requisite execution, &c.

Q. 2. What estate had Robert by the will of his father?

I think the use (as is above observed) may be to the father for life—after to the use of the son in fee, or to the son

in fee cloathed with a trust for the father for life, in point of benefit and enjoyment, in case he required it.

Q. 3. Whether Thomas Green, the grandson and heir of the first Ralph, be barred by the long possession of those who held the land; and if not, what action hath he to recover?

His title is no better than his father's was; and by the younger son's death in possession, and the descent cast, and the continuance of possession ever since in that right, the grandson is barred to bring any possessory action, ejectment or other, and even any real one, as I apprehend.

JO: CHESHYRE.

February 2, 1721-2.

MR. REEVE'S OPINION.

To the 1st Q.—I am of opinion that the deed will be sufficient to pass the lands from Ralph Green, the patentee, to his son Robert in fee; and that it will operate by way of covenant to stand seized. The proviso, that Robert should not have the possession to his own use, during his father's life without his consent, is a very good one, but will not in my opinion vitiate the deed so as to make it void; and it appears by the state of this case, that he had his father's consent, and enjoyed it during his father's life.

To the 2d Q.—If Robert's estate were to depend upon the construction of his father's will, I conceive he would take only an estate for life; but the remainder limited to his son Ralph, I take by construction of law to be but an estate tail, the estate being devised over, for want of his heirs, to his uncle Ralph, who would be the heir if he had no children of his own.

To the 3d Qu.—I think Thomas has no title to this estate; or if he had, in case no entry hath been made within twenty years, he will be barred of his ejectment by the statute of limitations; and I know of no other action he could have, unless it were a writ of right.

THOMAS REEVE.

February, 1721.

JURIDICAL SELECTIONS.

JUDGE BAY'S OPINION

ON THE EXTENSION OF THE RULES AND ARTICLES OF WAR TO THE MILITIA OF SOUTH-CAROLINA.

The petitioner, Mr. Lamb, is a private militia man in the Charleston battalion of artillery, and stood charged before the above Court-Martial, with having been guilty of *disobedience of the orders of the Governor and Commander in Chief*, in not appearing on the parade and joining his company, on the 31st day of May last, in pursuance of said orders; and also for being present, when other officers, non-commissioned officers and soldiers, were counselling, advising, aiding and supporting each other in disobeying the lawful orders of their superior officer; and there counselling, advising, aiding and supporting the officers, non-commissionsioned officers and soldiers, to disobey the lawful orders of their superior officer. For these alleged offences, he was

taken before the Court-Martial, in order to be tried under the Rules and Articles of War for the government of the Troops of the United States. Upon his being carried before this Court, he pleaded to its jurisdiction; which plea was overruled, and he was directed to plead to the merits, which he refused to do; whereupon the Court allowed him the benefit of the plea of Not Guilty, and went into the examination of witnessses against him; and after hearing them, he was, by order of the said Court, committed to the custody of the proper military officer, the Brigade Major, where he now remains. The present was therefore a motion, under the writ of Habeas Corpus, to have him discharged from his military arrest.

On the part of Mr. Lamb, it was contended by his counsel,—First, That he was not subject to the Rules and Articles of War; and, 2dly, That the Court-Martial, organized as it was, had no authority by law to try him under the Articles of War for any offence whatever *under our militia law*.

On the other hand, it was contended by the Judge Advocate General, That the petitioner was subject to the Rules and Articles of War made for the government of the United States troops; and that the Court-Martial, in that case, was fully competent to try him for any offence under them

Thus the matter comes before me, for my determination on these two important points. There were a number of other points made in the course of the arguments, some of which I shall have occasion to notice in my opinion; but it would lead me into prolixity to go through them all. I shall therefore only select those which are more immediately applicable to the case before me.

First. In order to subject the petitioner to the Rules nd Articles of War, the Judge Advocate General relied on the 11th clause or section of the militia act of 1794, as the basis

on which he means to found them. This section was very often repeated by the counsel on both sides, and different and very opposite constructions given to it, as best suited the views of the contending parties. It now falls to my lot to give my constructions of it; and I candidly confess, that when I first glanced my eye over it, I was rather disposed to give it the construction contended for on behalf of the State; but upon a more attentive consideration, I have been induced to take a very different view of it.

The words of the clause are these: "That the Commander in Chief for the time being, may, in case of invasion, or other emergency, when he shall judge it necessary, order out any portion of the militia of the State to march to any part thereof, and continue as long as he may think it necessary; and likewise may, in consequence of any application from the Executive of any of the U. States, on an invasion, or apprehension of invasion of such State, at his discretion, order out any number of the militia, not exceeding one third part thereof, to such state: Provided, That they be not compelled to continue on duty out of this State more than two months at any time; that whilst in actual service, in consequence of being so called out, they shall receive the same pay and rations, and be *subject to the same orders and regulations*, as the troops of the United States of America: Provided, That upon any transgression or offence of a militia man, whether officer or private, against the rules and regulations of the Federal army, the cause shall be tried and determined by a Court-Martial of the militia of this State; and that it shall be in the power of the Governor, or in case of his absence, of the commanding officer of the militia of this State, to mitigate, suspend or pardon any punishment to which any militia man may be sentenced by a General Court-Martial."

The foregoing clause obviously contemplates two occasions, on which the Governor is authorised to call out the

militia of this State : First, in case of an invasion or other emergency, he may call out as many as he may think proper for the defence of the State : Secondly, upon the application of any of the Executives of any of our sister States, he may order out as many as he thinks proper, not exceeding one third of the militia ; provided that they be not compelled to continue on duty out of the State more than two months at any one time ; that whilst in actual service, in consequence of having been so called out, they shall receive the same pay and rations, and be subject to the same *rules and regulations* as the troops of the United States.

Here, then, are two distinct bodies of men, for different purposes or services, subjected to the orders of the Governor or Commander in Chief ; one to do duty *in* the State, and the other to march and do duty *out of* the State. Now let it be asked, which of them is subjected by this clause to the Rules and Articles of War? or are they both subjected to them ?

The clause itself is not, in my opinion, sufficiently explicit on the subject. To come, therefore, at the intention of the Legislature, we must judge from the nature and reason of things themselves, and from the just analogy they bear to the different objects they had in view, as well as from the other clauses of the act itself.

To judge, then, from reason and analogy, there can be no doubt but the Legislature was perfectly competent to make every regulation relative to the conduct and government of the militia within the State, which could be needful and necessary. That body possessed every power and authority to prescribe rules and regulations for the militia, and to impose and inflict fines and penalties for disobedience, in any manner it thought proper to direct and appoint. There was no occasion therefore to submit the government of the militia within the State to any other system or set of rules on earth,

but to such rules and regulations as the Legislature thought proper to ordain and establish. It would, in fact, have been giving up, in a certain degree, a portion of the sovereignty and independence of the State, if they had done so.

But the Legislature possessed no right or power to make rules and regulations for any body of men out of the limits of the State, or beyond the boundaries of South-Carolina. It could not say that our militia code should have any operation in Georgia or in the province of Maine; nor could it be supposed that the Legislature ever would have acted so injudiciously as to have subjected our militia, when out of the State, to the terms and provisions of the laws of any of the other States, without knowing them, or whether they contained provisions which were proper for their government, or not. Such an idea would have been unworthy of that body. But as Congress had then lately assumed upon itself the government of the Union, and the Federal Constitution had committed to its care the common defence of all the States, it was natural to suppose that the militia, when sent abroad, might come in contact with the troops of the United States; and as Congress had established rules for the government of the Federal army, it was also reasonable to suppose that our Legislature, who were then in the act of organizing our militia in conformity with the act of Congress, would have found itself more disposed to adopt those Rules and Regulations than any other ones, for the government of our militia men when beyond the limits and jurisdiction and out of the reach of the laws of this State.

This view of the subject, then, prepares the mind for a fair and reasonable construction of the clause under consideration. And, in my judgment, it is not straining the rules of construction too far, to say that the Legislature, in this 11th clause, never intended to subject any other portion of the militia to the Rules and Articles of War, but that part of them which was to be sent out of the limits and jurisdiction

of the State, leaving the portion remaining in the State sub ject to our own internal military regulations.

The first proviso, therefore, in this clause, appears to me to relate exclusively to that portion of the militia which was intended to be sent out of the State to the assistance of a sis ter State ; as well with respect to the time and duration of service (two months) as to the pay and rules and regulations by which they were to be governed while out in this service. And the second proviso seems strongly to corroborate and confirm this idea, and I perfectly coincide in opinion with one of the gentlemen who argued on behalf of the State, that it should be read, " provided also," that upon any transgression or offence of any militia man, whether officer or private, against the rules and regulations of the Federal army, the cause should be tried by a court-martial of the militia of this State. If this be not the true construction, why so much care and circumspection about the trial of offences by officers of *this* State. If offences were committed in our own State, the offenders would of course be tried by no others but the officers of this State. But the solution of this question is easy and natural from the foregoing view of the case.

It was foreseen that offences that might perhaps be committed against the Rules and Articles of War, without the limits of this State, at a time and place where the offenders might be tried by officers *other* than those belonging to the State of South-Carolina. Hence that caution in the Legislature in declaring that offences should be tried by no other than the officers of this State. This latter restriction or regulation respecting our troops, is strong proof to my mind that both of the provisos in this 11th clause were intended to apply only to that body of our militia which might be sent out of the state ; and it is a marked regard which the Legislature intended to pay to its own citizens, in not subjecting them to rial bty any other men but those taken from their

own body; which is further evinced by their sentences be ing all made subject to the revision of the Executive of th State for the time being.

I differ in my construction of the latter proviso from ano ther of the counsel on behalf of the state. *He admitted tha the first proviso in this clause did not subject the militia within the State to the Rules and Articles of War;* they wer out of the question as to them. But he contended that th second proviso subjected the militia within the State, who re fused to obey the call of the Executive to turn out, to the pe nalty of the act of Congress of 1795, which imposes a fi "not exceeding one year's pay" on all such defaulters. I hav considered that clause in the act of Congress, and am dec dedly of opinion, that it cannot extend to any other body o men but those called into the service of the United States b the President of the United States. If any portion of ou militia had been called out by the President into the servic of the United States, and had refused to obey that call, the I do admit that any defaulter would have been liable to th penalties of that act; but as no such call has been made by the President, I do not see how it can possibly apply to th militia called out by our Executive into the service of our own State.

I shall now proceed to the examination of the other clauses of the act of 1794, and see what farther provisions are made for the government of our militia within the State; and whe ther any of them subjects the petitioner to the Rules and Ar ticles of War, or authorizes the present Court-Martial to proceed in his trial.

It will be remembered that the first part of the clause of the 11th section I have just been considering, gives the Go vernor or Commander in Chief, in case of invasion or other emergency, the power of calling out any portion of the mi litia of this State he may judge necessary, to march to any

part of it, and continue in service as long as he shall judge necessary. But no specific fine or penalty is fixed for the disobedience of this order or call of the Executive, by this clause.

The 12th section authorises any Major-General or Brigadier General or commanding officer of a Regiment, when and as often as any invasion may happen, to order out the militia *in their respective commands*, for the defence of the State, &c. giving notice to the Governor as speedily as possible; and the commanding officer of every regiment or battalion, in case of any insurrection, is to assemble his men and use his utmost endeavors to suppress it; and in case any one is wounded or disabled, he is to be provided for at the expence of the State. No specific fine is however fixed for any disobedience of orders, by this clause.

Hence I infer, that although the Governor has the power, by the 11th section, to call out the whole militia of the State, if he thinks proper, for its defence, and to order them to any part he may judge necessary; and although by the 12th section the Major-Generals, Brigadier-Generals and commanding officers of regiments have the same powers within their respective limits, to call out the men for the same purpose; yet the two clauses are perfectly silent as to any penalties for the disobedience of their respective orders. And it appears to me to have been a great oversight in the Legislature of that day, in not providing ample remedies, by fines or otherwise, to compel men to pay a proper obedience to the orders of the Governor and other superior officers, upon such pressing emergencies.

The 13th clause fixes the pay and compensation to be allowed the militia after being called into actual service, to be provided for in the tax bill in the year the service is performed. It is worthy of observation, however, in reading over this clause, that if ever it had been the intention of the

Legislature to have subjected the militia within this State to the Rules and Articles of War, after the omission in the two former clauses, it would have been mentioned in this clause, which says that the officers shall receive the same pay and rations as are allowed to officers of the same rank in the Federal army; yet it is totally silent as to either officers or men being subject to the rules and regulations of the Federal army. One would be almost induced to say, it seems to have been carefully avoided, in regard to the troops *within* the State, after subjecting the troops, by the 11th section, which were to be sent *out of* the State, to those rules and regulations. It would be difficult, therefore, to get over the strong presumption, arising from this clause alone, that it never could have been the intention of the Legislature to have subjected the militia within the State to the Rules and Articles of War, even if there was no other circumstance to warrant such a conclusion.

The subsequent clauses of the act go mostly to affix particular penalties to certain specified offences mentioned in the different clauses.

The 17th clause fixes the fines on the officers and men for not attending at regimental and ordinary musters. The 18th clause imposes a fine on every non-commissioned officer or private who neglects or refuses to obey the order of his superior officer while under arms, and *also* for neglecting or refusing to do military duty or such exercise as he shall be required to perform; or who shall depart from his *colors or guard*. The 21st clause fixes a small fine for not appearing at musters, armed and accoutred, agreeably to the act of Congress passed in 1791. The 25th clause provides for making alarms and sending expresses to the General and Field Officers throughout the state. The 26th clause directs, that on sight of the enemy, the officer to whom information is given, shall communicate the alarm by firing small arms (three guns) and beat of drums, to warn the neighbors and get the

corps together; that he shall send expresses to the Governor and Brigadier-General, or other commanding officer, to assemble the men to march to the assistance of those who are in danger, &c.

The 27th clause declares, that if any man liable to bear arms shall refuse or neglect to use his utmost endeavors to convey or communicate such alarm, or notice of the approach of the enemy, he shall pay a fine not exceeding fifty pounds sterling. And in case any person, after he has notice of such alarm, does not forthwith repair, completely armed and accoutred, with all convenient speed, to the place of rendezvous of his regiment, troop or company, he shall forfeit a sum not exceeding twenty pounds sterling; and in case the regiment, troop or company to which he shall belong engage the enemy before he joins it, he shall forfeit a sum not exceeding forty pounds sterling.

The 29th directs, that when it shall be necessary to march the several regiments, troops or companies out of the districts parishes or counties to which they belong, one fourth shall stay at home and form patroles; and shall continue to ride patrole, to guard the plantations and keep the slaves in order until the rest of the companies shall return to their plantations; and in case of refusing to do such patrol duty, every person so offending shall forfeit and pay a sum not exceeding fifteen pounds sterling.

These, I believe, will be found to be the principal, if not all the fines imposed by the militia act. And here it cannot escape the notice of any reflecting man, that if ever it had been the intention of our Legislature to have subjected any citizen to the *pains of death*, for any offence against this law, within the State, it is most natural to conclude that it would have enacted and fixed that severe penalty, in these extreme cases where the very existence of the State was in the greatest danger. For what emergency can be greater,

or what case more extreme, than that of an enemy in sight, or of an alarm given in the manner prescribed by the 26th clause of the act above cited? And yet, even in this emergency or time of alarm, we find that the Legislature only imposes on those who do not repair to their posts, after notice of such an alarm, a fine of 50 pounds sterling. The plain and obvious inference is, that they never could have contemplated so severe a penalty as that of death, for any offence under this act, and much less that they should have intended such a dreadful punishment for the disobedience of the Governor's call on an emergency, which it must be admitted, falls far short of that so distinctly stated in the clause above referred to. To suppose such an intention, would be an outrage offered to justice, and the severest reflection on the wisdom of a Legislative body.

Having now gone through the subject of fines and penalties, it brings me to the second great point under consideration, viz.

Secondly—The organization of Courts-Martial for the infliction and recovery of them, and the right of the present Court-Martial to try the petitioner. It will be found that the 21st clause of the act is the only part of it which treats on this subject. The first part of this clause declares that all fines shall be inflicted on non-commissioned officers and privates by judgment of the majority of the commissioned officers of the company in which the offender is enrolled. It then proceeds to direct how Major-Generals shall be tried; next Brigadier-Generals; next Colonels, Majors, Captains and subalterns; after which it prescribes the manner in which those Court-Martials shall be appointed, viz.

That the Governor or Commander in Chief shall appoint Court-Martials on General Officers. That the Major-Generals shall appoint Division Courts-Martial in their respective Divisions. That the Brigadier-Generals shall appoint

Brigade Courts-Martial in their respective Brigades. That Lieutenant-Colonels shall appoint Regimental Courts-Martial in their respective Regiments; and Majors of Battalion in their respective Battalions. And it concludes by declaring that no sentence shall be put in force without the same be approved by the respective officers appointing the same, or by the commanding officer for the time being.

This clause, then, is the origin of all Courts-Martial for the trial of offenders and for the recovery of fines and penalties under the act; and no fine can be recovered in any other manner than is prescribed by this act. It is the only clause that prescribes the mode and manner of appointing Courts-Martial; and no Court-Martial otherwise formed than as the act directs, can try any offender, or recover any penalty or fine under the act; for it is a well established rule of the common law, in constructing statutes, that whenever a statute prescribes a thing to be done which was unknown to the common law before, it shall be done in the manner prescribed by the act, and in no other manner or form whatever.

Hence it clearly results, that no Court-Martial, however organized and appointed, has any power or authority to try the petitioner Mr. Lamb, for any offence against this act, but the officers of the company in which he is enrolled.

I have now finished all the observations upon the different clauses of the act which my judgment tells me are material to be taken into consideration in the case now before me. I shall next proceed to consider some of the other points made in the course of the argument.

First—And the first and principal one to which my attention was called by all the advocates on the part of the state, was, "The construction which ought to be given to this act, so as that the intent and design of it might be carried into execution," and particularly by construction to supply the *defects* of the act.

It was contended that if it was a doubtful point, whether the articles of war were really extended to the militia of this State or not, for refusing to obey the call of the Executive, it was nevertheless the duty of the Court to give such a construction to the 11th clause as would extend them—especially as no other penalty was affixed for such disobedience; and without it, the law itself would become a dead letter, and that too at a time when energy and vigor were necessary for the safety of the country.

If these arguments had been addressed to me as a Legislator, and if I had the power of giving greater energy to the law, I probably might have felt their full force and effect, but they were addressed to me as a common law Judge, sworn to maintain the laws and constitution of the State—In this capacity, political considerations, and arguments *ab inconvenienti*, were unavailing. I do admit that all remedial laws ought to be construed liberally, in order to guard against a particular evil, and remedy the defects complained of; in all such cases, the spirit of the act ought to be sought for rather than the strict letter adhered to. But the converse of the proposition is true, in all penal acts; they are to be construed strictly: and I do not believe there *could be* a stronger illustration or instance of the wisdom of this principle of the common law than the one before us.

What is the construction I am called upon to give in the present instance? Why, it is to extend by *implication* a military system to this State, by which the citizens may be taken and tried for their *lives* by a Court-Martial, without a *Jury of the vicinage*, agreeably to the law of the land. I beg to have it correctly understood, that the principle contended for will go all this length, although the advocates avowed *they* never intended *it should* go so far. But it is in vain to say, that it never was the intention of the State to go to such an extremity; that it was only intended to inflict some small pecuniary punishment. Only establish the

principle, that the militia in this State are to be subject to the Rules and Articles of War, and there is nothing between *him* and *death* but the *will* of a Court-Martial, and the *mercy* of the Commander in Chief.

The military indictment in this case (if I may be allowed the expression) or rather specification of offences against the petitioner, Mr. Lamb, contains two specific charges:

1. For not appearing on the parade on Monday the 31st May last, agreeably to the order of the Commander in Chief, *i. e.* a disobedience of orders.

2. For mutinous conduct, in being present on the 31st of May last, when the other officers and soldiers were counselling, advising and supporting each other in disobeying the lawful order of their superior officer, and then and there counselled and advised, aided and supported the other officers and soldiers, to disobey the said lawful order of their superior officer.

The first of these offences is punished by the Articles of War, according to the discretion of a Court-Martial and the nature of the offence; which was formerly flogging on the bare back, but now commuted for confinement, hard labor, and some times a chain round the leg or neck, affixed to a large iron ball, &c.

The second of these offences is punishable with *death*, or such other punishment, similar to the above, as the Court-Martial shall think proper to inflict.

These are the punishments imposed by that military system, which I am called upon to extend to this state, in order to give vigor and energy to our militia system. Before such a construction could be given, there should be no uncertainty or doubt on the subject. The intention of the Legislature should be as clear as light, and irresistible as time. It

should be so evident, that the mind of man could not suppose the contrary. Whereas even the advocates for this construction admit, that this part of the act is very obscurely penned, and that the intention is ambiguous and doubtful, and therefore for these reasons it is that I have been called upon for a construction to clear up all these difficulties, and to make that certain which before was extremely doubtful and obscure. My mind revolts at such an idea! If I could be weak enough to be brought into such a measure, I should violate every rule of law upon the construction of penal statutes! And at the same time I should give up one of the dearest and most invaluable privileges of my fellow-citizens, upon a point of all others the most interesting to them.

There is still another ground which renders it impossible for me to give such a construction. The act passed in 1794, and the Articles of War which I am called upon to extend, were established in 1806, twelve years afterwards. By what possible rule of construction, then, can I say that these were the rules referred to in the act, which were formed so many years after it passed? The Rules and Articles referred to by that act, were the existing ones which were in use at that time, and which were not so penal as the present ones—They could have been no others.

It would have required the spirit of divination to have foretold at that day, that the present Rules and Articles of War ever would have been promulgated. It follows, therefore, of course, that those now in use in the Federal Army could not have been those referred to by the act of 1794—if every other objection was removed out of the way, it would have been impossible to have got over this one.

Secondly:—I have been called upon to support the jurisdiction of the Court-Martial appointed from another brigade to try Mr. Lamb and the other defaulters mentioned in the Commander in Chief's orders, and it has been again urged

as a reason, that unless the offenders are tried under the Court-Martial organized under the Articles of War, the militia will become nugatory and void.

Upon this point of jurisdiction I have to observe, that another objection presents itself, as insurmountable as the one in the former case, and very nearly allied to it.

It is a well known rule of common law, that whenever a statute creates a new jurisdiction, unknown to the common law, nothing shall be presumed to be within its jurisdiction but what is expressly given. It must be composed of the same members, and be organized in the same manner as is prescribed by the statute; and its powers and jurisdiction must be confined to the same objects as the statute prescribes. If there are any deviations from these rules, the common law, which superintends all inferior jurisdictions, will step in, and level all their proceedings.

I have already had occasion to observe upon the formation of Courts-Martial, under our militia act, in a former part of this opinion; and that the non-commissioned officers and men could only be tried by the officers of the *company in which they are enrolled.* It is admitted in this case, that the officers composing the present Court-Martial, do not command the company in which Mr. Lamb was enrolled—and I have seen no law authorising a Court-Martial, organized as the present appears to have been, and certainly none was quoted in the argument for that purpose.

The President of this Court, and the other gentlemen composing it, do not even belong to the 7th Brigade, of which Mr. Lamb's company forms a component part: I do not therefore see how the present Court Martial, taken entirely from another Brigade, can sit and try men for offences committed in a Brigade to which they do not belong. It was said in the argument on the part of the State, that these

officers themselves were subject to martial law, and were on duty, and therefore were the fittest men to try delinquents. I confess I do not see how this gets over the objection, or how it authorises them to sit and try men in a Brigade of which they form no part. For, admitting that the articles of war were in full force against all the men in the 7th Brigade, still from the manner in which Courts-Martial are to be organized agreeably to that act, the men must be tried by officers of the company to which they belong, and no others—for it is a well known maxim of law, that *expressio unius est exclusio alterius.*

Third :—The constitutionality of martial law has been called into question.

If by martial law is to be understood that dreadful system, the *law of arms*, which in former times was exercised by the King of England, and his Lieutenants ; when *his word was the law*, and his *will the power* by which it was *exercised*, I have no hesitation in saying that such a monster could not exist in the land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the conquest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons, by its ghastly appearance. All our civil institutions forbid it ; and the manly hearts of our countrymen are steeled against it. But if by this military code is to be understood, the rules and regulations for the government of our men in arms, when marshalled in defence of our country's rights and honor, then I am bound to say, there is nothing unconstitutional in such a system.

Foreign nations are in the constant habits of raising and keeping armies in the field, and navies on the ocean, to attack us, and all that is dear to us. The great principle of

self-defence, the first law of nature, requires and enjoins it upon us to be prepared to defend ourselves—and in order to do this effectually, large bodies of men must be raised and trained to arms, adequate to this defence—without order and discipline, they would soon become a rabble, an armed mob, the fittest instruments for tyranny and oppression. Hence the necessity and expediency for wise and salutary rules and regulations, to enforce obedience and due subordination.

It is unnecessary for me to dwell longer on this point, as I conceive the opinion of the Judiciary of this country has on a former occasion been fully expressed. I mean in Zylstra's case, which was so much relied on in the course of the argument. The opinion of the Court in that case, was delivered by my late brother Waties, now one of the Chancellors of this State, whose opinions and judgments stand deservedly high in South-Carolina; he in that opinion says, that Courts-Martial for the purposes therein mentioned, are fully authorised by the words in the Constitution "Lex Terræ" or the laws of the land, on account of their great *public expediency*, "that the trial of offenders against military rules by a "jury, would effectually destroy that subordination which "is so necessary for the safety of an army, and is the soul of "all military enterprises." I fully gave my assent to this doctrine at that day, and time has more fully confirmed me in the opinion of its justness and propriety.

There were several other points which sprang out of this investigation, which I have not noticed, well worthy of observation, and which I hope will not yet be lost to the community; but I trust that those I have mentioned and observed upon, will be found to embrace all the great leading features of the case now before me.

To sum up the whole of the case then, which has been urged with so much ability and talents by all the gentlemen concerned, (and to whom I tender my acknowledgments for

the respectful and gentlemanly manner in which it was conducted,) it does appear to me, from the best view I have been able to take of the case, that the 11th clause of our militia act, has omitted to provide an adequate remedy for the disobedience of the order of the Governor and Commander in Chief, on the occasions and emergencies mentioned in that clause, and for trying and punishing such disobedience. That the 12th clause is also deficient, in not providing adequate remedies for disobedience of the orders of the Major-Generals, Brigadier-Generals and Commanding Officers of Regiments—and probably from these sources, all the evils complained of have originated: all the other specified offences in the act, seem to be well provided for, and adequate means established for the punishment of offenders.

Before I finally conclude, I hope I shall not be considered as stepping too much out of my line of duty on the present occasion, by expressing an ardent hope, and my sincerest wish, that the same noble spirit of patriotism which carried us triumphantly through the revolutionary war, will always animate the freemen of South Carolina to give every possible aid to the laudable zeal and exertions of our Executive Chief Magistrate, in his strenuous endeavors to defend our country from the designs of our formidable enemy, although the terrors of martial law are not suspended over their heads; and that in future, instead of having occasion to censure, he may have abundant cause for praise and commendation.

Let the prisoner, Mr. Lamb be dischargea from his military arrest.

JUDGE TILGHMAN's OPINION

ON THE POWER OF THE EXECUTIVE OVER ALIEN ENEMIES.

From the return to this writ of *Habeas Corpus*, and the evidence, which has been produced, it appears, that *Charles Lackington*, who is a subject of the British King, came into the United States, before the declaration of war, and has never been naturalized. His business was connected with commerce; and on the 18th of July, 1812, he reported himself to John Smith, Marshal of the District of Pennsylvania, as an alien, and British subject. On the 19th of March, 1813, he applied, as an alien enemy, for the Marshal's passport, to repair to Lancaster, which was granted; and, at his own request, afterwards changed to Reading; in pursuance of an order issued from the office of the Secretary of State, by which all alien enemies (with certain exceptions, not including the case of Mr. Lackington) were directed to retire, to a place above forty miles from tide water, to be designated by the Marshal. On the 9th of December, the Marshal found Mr. Lockington in Philadelphia, in violation of the order above mentioned; upon which he required him to retire to Reading. This being refused by Mr. Lackington, the Marshal took him into his custody, and placed him for safe keeping, in the debtor's apartment, of the city and county of Philadelphia, until he could be conveyed, or would consent to retire, to Reading, or should be discharged by due course of law. The reasons assigned by Lackington, for coming from Reading to Philadelphia, was the want of money to subsist in Reading; and he offered to return thither, if the Marshal would furnish him with money. War having been declared by the Congress of the United States, on the 18th day of June, 1812, proclamation of that event was made by the President on the day following. On the 7th day of July, in the same year, a notice was issued from the Department of State, and published in those newspapers,

in which the laws of the United States are published, by which all British subjects were required to make report of themselves to the Marshals of the districts, in which they resided; and at the same time the several Marshals were directed to cause the laws, which relate to alien enemies, to be published, in order that such persons might be informed of the situation in which they stood. Those laws were, accordingly, published. On the 23d of February, 1813, an order was issued from the Department of State, and published in the newspapers, by which "alien enemies, residing, "or being within forty miles of tide water, were required "forthwith to apply to the Marshals of the states, or territories, in which they, respectively, reside, for passports, to "retire to such places beyond that distance from tide water, "as should be designated by the Marshals;" subject to certain exceptions, not affecting the present case. At the same time the several Marshals of the United States received instructions from the Department of State, to take into custody, and convey to the places assigned to them, all persons to whom the said requisition was applicable, and who did not immediately conform to it. On the 15th of April, 1813, the several Marshals were informed, by a note from the Department of State, that the President had appointed John Mason, Esq. Commissary-General for prisoners of war, "including the superintendance of alien enemies;" and that, in future, all letters and documents on those subjects, were to be addressed to that gentleman; and all instructions from him in relation to the same, were to be obeyed; unless otherwise directed from the Department of State. On the 31st of May, 1813, a circular letter, signed by John Mason, was addressed to the several Marshals of the United States, and published in the newspapers. This letter was dated, "Office "of Commissary General of Prisoners, Washington, May "31, 1813," and is expressed in the following form:— "The President, being desirous of defining, more particularly, the treatment of alien enemies, and of extending as

much indulgence to them, as may be compatible with the precautions made necessary, by the present state of things, directs, that, in regard to such as may be within your district, you will be governed by the following rules. You will cause to be removed, as heretofore prescribed, if not already done, under the former orders from the Department of State, all who are not females, or under eighteen years of age, who are not laborers, mechanics, or manufacturers, arrived in the country previous to the declaration of war, and actually employed in their several vocations; subject, however, to the following modifications." Then follow the modifications, none of which apply to Mr. Lockington. These are all the facts of any importance on the present question.

It has been contended, that the orders issued from the public offices, are not to be considered as the acts of the President; and that, if they are his acts, they are not authorised by law. Both these objections shall be considered. but I shall first advert to the point, introduced in the suggestion filed by the Marshal, which goes to the jurisdiction of a State Judge, in cases like the present. It is supposed that the State Judges have no authority to issue a writ of habeas corpus, because the power of declaring war, being vested in the Congress of the United States, all matters appertaining to that subject, must be under their coutrol; that Congress, if it had pleased them, might have considered alien enemies as prisoners of war, who are not entitled to the benefit of a writ of habeas corpus—and finally, that the laws of the United States having given to the State Judges certain jurisdiction, with respect to alien enemies (which I shall have occasion to mention hereafter) but having not given to them authority to interpose by a writ of habeas corpus, that writ ought not to be issued.

In answer to these suggestions, it is to be observed, that the authority of the State Judges, in cases of habeas corpus, emanates from the several States, and not from the United

States. In order to destroy their jurisdiction, therefore, it is necessary to shew, not that the United States have given them jurisdiction; but that Congress possess, and have exercised, the power of taking away that jurisdiction which the States have vested in their own Judges. Our act of Assembly directs, that in all cases "where any person not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any color or pretence whatsoever," he shall be entitled to a writ of habeas corpus. Now, it is no answer to this law to say, that being made before the present Constitution of the United States was established, it could not be intended to apply to cases arising under the Constitution. The people of Pennsylvania still remain citizens of the commonwealth, as well as of the United States; and it is of as much importance to them to be relieved from unlawful imprisonment, under color of authority derived from the U. States, as from any other imprisonment. When the present Federal Constitution was adopted, the people were not easy until they had obtained an amendment declaring that the powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people. A writ of habeas corpus must therefore be issued, in all cases where the right to issue it has not been given up to the United States. That this right has not been given up, was my opinion, delivered in the case of Olmstead, where I assigned reasons which I shall not now repeat. But that is not all. It is a principle well established, that even in cases where Congress might assume an exclusive jurisdiction, the authority of the States remains, until such a jurisdiction is assumed. There are many instances in which the powers of the United States are suffered to lie dormant; such as the power of establishing uniform laws on the subject of bankruptcies; and while the power remains dormant, the several states regulate the subject. In subjects, also, within the jurisdiction of Congress, when

they do legislate, the authority of the States is taken away only so far as the law of the United States declares.—This is exemplified in the act establishing the judicial courts of the United States, where it will be found, that in some instances the courts of the United States are vested with an exclusive jurisdiction; but in many more they have jurisdiction concurrent with the courts of the several states; and although it is true, that by the terms of the act, the courts of the United States have only a concurrent jurisdiction, yet I apprehend the construction would be the same if the express terms had been omitted. By the 14th section of the same act, power is given to the Judges of the United States to grant writs of habeas corpus, for the "purpose of an enquiry into the cause of commitment; provided, that they shall in no case extend to prisoners in goal, unless where they are in custody under or by color of the authority of the United States, or committed for trial, before some court of the same, or are necessary to be brought into court to testify." Now, if it had been intended to exclude the State Judges, this is the place in which we might expect evidence of such intention; for the subject was full in the mind of the Legislature, as appears by the care with which they restrained their own Judges from interfering with commitments not under the authority of the United States.

The judicial power of the United States extends to all cases in law or equity, arising under the constitution, the laws of the United States, and the treaties made under their authority. Supposing that Congress had a right to assume an exclusive jurisdiction, in all cases founded immediately on these snbjects, the exercise of it would be intolerably grievous without a great increase of courts and judges; and even then it would often happen that the State courts would have to decide on the constitution, laws and treaties of the United States, on questions arising, collaterally, in causes within their jurisdiction. Still the authority of the United

States may be preserved, by retaining, as they have retained, an appeal to their own courts. But it seems to be the general opinion, that from a decision on a habeas corpus, no appeal or writ of error lies; and thus, points of vital importance to the United States, may be determined by State Judges, without an opportunity of revision. This may certainly be a very serious evil, but it does not appear to be without remedy. For, although by the general principles of law, an appeal or writ of error might not lie; yet the subject being within the power of Congress, they may regulate it as they please. As to an attempt to take away from the State courts, altogether, the right of issuing a writ of habeas corpus, in any case where a man pretends to justify an imprisonment under the authority of the United States; whenever the subject shall be brought before Congress, it will be found to be attended with very great, if not insuperable difficulties.

I have said thus much on the point of jurisdiction (altho' I consider it as having been long settled and acted upon by the Supreme Court of this State) because some persons of high standing in other States, for whose opinions I entertain the most sincere respect, have expressed doubts on the subject. It is a matter deserving the greatest consideration, in which the people of the different States are deeply interested. The inconvenience of clashing opinions between federal and State Judges, may sometimes be felt; but when I consider the situation of a Pennsylvanian, imprisoned unlawfully, by color of a pretended authority from the United States, on the banks of the Ohio, or the shore of Lake Erie, with only one Federal Judge to whom he can apply, and that Judge in the city of Philadelphia, I feel as little *inclination* as I have *right*, to surrender the authority of the commonwealth.

But there is another objection against this habeas corpus, applicable equally to the Judges of the States and of the U-

nited States: it is that Mr. Lackington is in the situation of a prisoner of war. If he be so, he is not entitled to a privilege which never could have been intended for persons of that description. A prisoner of war is subject to the law of war; he is brought among us by force—and his interests were never in any manner blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection. His object was to injure us—and we bring him hither solely for safe-keeping. Far different is the case of a great body of people, who, although now placed in the situation of enemies, by events over which they had no control, yet, in their hearts, may bear no enmity to the U. States: nay, who may even prefer this country to their native soil. Many of them came among us, with a view of sharing our fortunes. Many we held out invitations to; they were suffered to acquire property, personal and real—we permitted them to swear, that they intended to renounce their native sovereign, and become fellow-citizens with us. Many, it is true, came merely on business, without such intent, and may be really inimical. But even they had that implied promise, which civilized nations have long been supposed to make, that in case of sudden war, there should be permission to depart in a reasonable time, without injury to person or property. I am far from denying, however, that the condition of these people is to be decided, not by a reference to the usual courtesy of nations, but by our own laws. Congress had the power of legislating on the subject: they have exercised that power; and their acts are paramount to all foreign customs. It is these acts which we are now to consider, and it will be found, that they are such, as the most civilized nation need not blush to avow. They preserve a sacred regard for treaties; and in cases where no treaty exists, they vest the President of the United States with full powers, to be exercised "according to the dictates of humanity, and national hospitality;" not forgetting, however, a due re-

gard to the public safety. It has lately been decided, by the Supreme court of New-York, in the case of *Clark* vs. *Money* (10 Johns. 59) that British aliens residing in the U. States, so far from being considered as prisoners of war, may sue, and be sued, as in time of peace.

The act respecting alien enemies, was passed on the 6th of July, 1798. In considering it, I shall not take the wide range, which was taken in the argument of this case. In fixing its true construction, it is of no importance, under what administration it was enacted; by whom it was brought forward; or by whom advocated, or opposed on its passage. It is the law of the land; and being so, it becomes the duty of every individual to obey it, and of every Court to enforce obedience to it.

It begins by enacting, that when war is declared, or invasion by a foreign nation is perpetrated, attempted or threatened, and the President of the United States shall have made public proclamation of the event, "all natives, citizens, denizens, or subjects, of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies." Here is a broad proposition, standing as a foundation for summary proceedings against persons who are declared to be in the situation of alien enemies. I do not consider, as has been contended by Mr. Lackington's counsel, the apprehending, restraining and securing, here mentioned, are to be intended solely for the purpose of removal out of the United States. It is a provision for the public safety; which may require that the alien should *not* be *removed*, but kept in the country under proper restraints; and the nature and degree of these restraints, in cases where there has been no misbehavior, may depend, in some measure, on the treatment which the hostile government gives to citizens of the United States, who may chance

to be within its power. The act then proceeds to declare that "the President of the United States shall be authorised, in any event as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, towards the aliens, who shall become liable as aforesaid; the manner and degree of the restraint to which they shall be subject; and in what cases and upon what security, their residence shall be permitted; and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations, which shall be found necessary in the premises, and for public safety." Then follows a proviso for securing the observance of treaties, which is not material in this case; because, at the time of the declaration of war, there was no treaty, regulating the subject, in existence, between the U. States and Great Britain.

In the second section of the act it is enacted—"That after any proclamation shall be made as aforesaid, it shall be the duty of the several Courts of the United States, and of each State having criminal jurisdiction, and of the several Judges and Justices of the Courts of the United States, and they shall be, and are hereby respectively authorised, upon complaint against any alien enemy, or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction, or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such Court, Judge or Justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens, to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrain-

ed, conformably to the proclamation or regulations which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made as aforesaid, shall be performed."

It cannot be doubted, but that the provision in the first section, considered without reference to the second, authorises the President to establish a regulation, that all alien enemies of a certain description, shall retire immediately to a place to be appointed by the Marshal; and that, in case of non-compliance, the Marshal shall remove them. But the second section, having authorised certain Courts and Judges, upon complaints made against alien enemies, to have them apprehended, and brought before them; and, after hearing, to make such order as may be necessary, for carrying the regulations of the President into effect; there is not wanting strong color for an argument, that the only manner of executing the regulations, is by complaint to a Court, or Judge. This is a point well worthy of serious consideration. I have considered it attentively; and I shall give the reasons which have induced me to conclude, that, notwithstanding the second section, the President was authorised to make an order for the removal of the alien enemy by the Marshal, in the first instance. It is never to be forgotten, that the main object of the law, is, to provide for the safety of the country, from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies. It is well known, that the United States are exposed to great danger, in a war with an enemy who commands the sea. Bounded by the Atlantic ocean to a great extent, with numerous bays and navigable rivers, penetrating the very heart of the country; there is no knowing when, or where, the attack may be made. Without incurring the charge then, of undue severity, prudence might require, that alien enemies residing in large cities,

should be removed with more secrecy and more expedition than the formalities of law admit. The President being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety, so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse: but that was a matter for the consideration of those who made the law, and must have no weight with the Judge, who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people, jealous of their freedom, that from necessity, the hands of the executive power, must be made strong, or the safety of the nation will be endangered.

But it may be asked, what is the use of the provisions in the second section, concerning Courts and Judges, if the regulation of the President may be executed without resorting to them? The answer is, that the use is great. In the first place, where the Marshal is ordered to make the removal, he is at liberty to apply to the Judges, and there may arise cases, in which he will find it prudent, to strengthen himself by the judicial authority. But besides, many regulations may be made, which contain no order for the Marshal to act, or which may direct him to proceed by way of complaint to the Judges. If the regulation in question had simply been, that alien enemies should retire to a place to be appointed by the Marshal, any citizen might have complained of an alien enemy, who declined to comply; and a Judge might have made and enforced an order for his removal. There may be various regulations for the general conduct of alien enemies, without pointing out the mode of carrying them into effect; and in all such cases, the Courts may take cognizance of them. There may be regulations,

which barely order that certain things shall be done, or shall not be done, without defining the penalty in case of disobedience. In such cases, the Judges to whom complaint is made are vested with considerable discretion. They may, according to the nature of the case, either direct the alien enemy to be removed out of the United States, or to give security for his good behaviour, or to be imprisoned until the order of the President is complied with. It would be a waste of time to point out all the uses of this provision, respecting the power of Courts and Judges. To those who reflect on the subject, many more than I have mentioned, will suggest themselves. It is worthy of remark, that in the third section of the act, it appears, that the President may, by his warrant, directed to the Marshal, order him to apprehend any alien enemy, and remove him out of the territory of the United States. Now, it is difficult to conceive a reason, why the President should be authorised to remove any alien enemy *out of the country*, without assigning a cause, and yet that he should not be permitted to direct, that those of a certain description, should repair to a certain place *within the United States*, and in case of a refusal, that the Marshal should remove them. The particular reason assigned by Mr. Lackington, for not complying with the order of the President, I cannot but very much regret. But, although it absolves him from the charge of obstinate and perverse disobedience, yet, it can have no effect on my judgment, as it is a subject on which I have no power to act. I am not without hopes, however, that this public discussion may bring to the mind both of our own and the British Government, a matter which seems not to have been attended to: that is to say; that persons, detained in a foreign land, cut off from their funds, and without the opportunity of pursuing their usual occupations, may be involved in distress, which demands relief.

But, supposing the President had power to make the regulation under which the Marshal has acted, it is denied

that he ever did make it. The act of Congress requires, that the President should establish regulations, by his proclamation, or other public act. He has made no proclamation; but has he not made a public act? The first order was issued from the Department of State, although it does not appear to be signed by the Secretary of State, nor is the name of the President mentioned in it. The Attorney for the United States, says that the orders of the President are usually communicated in this form. If the matter rested on this notification, I should be somewhat at a loss what to think of it. The President could not transfer his power to the Secretary of State; and as there is no mention of his name, some evidence might be necessary, to shew that it was really his order issued from the Department of State. But the order issued from the Commissary-General of prisoners, puts the matter out of doubt; for, the regulations there established, which refer to, and adopt the former orders from the Department of State, are expressly declared to be the act of the President, although they are not signed by him, but by the Commissary. This is sufficient to satisfy me. Being published as the orders of the President, signed by an officer of high trust, and never disavowed, I consider them as public acts of the President.

I must add a few words, with respect to the return to this habeas corpus. The writ is directed to *Joseph Corman*, keeper of the debtor's apartment of the prison of the City and County of Philadelphia, who made return, that he detained Mr. Lackington by virtue of a written order from *John Smith, Esq.* Marshal of this district, by which he was commanded to keep the said Mr. Lackington, who had violated the orders of the President, &c. until he should be discharged by law. Connected with this return, I must take the suggestion presented by the Marshal, and verified by his oath; by which it appears, that he placed Mr. Lackington in the debtor's apartment, until he could be conveyed,

or would voluntarily go, to Reading. The Marshal's order to the keeper of the prison has, at first view, somewhat the air of a judicial act, for which he certainly can have no authority. But the peculiar circumstances of the U. States, with regard to prisons, will serve to explain the matter.—They have no prisons of their own, and make use of the State prisons, by permission of the several States. Although the Marshal held Mr. Lackington in custody, in a ministerial capacity, it might be necessary for him to give the keeper of the prison, some document to authorise his detaining him. So that I consider Mr. Lackington as, in fact, in custody of the Marshal. Being of opinion that the Marshal had a right to take him into custody, and place him in the debtor's apartment, for safe-keeping, until he could conveniently be removed to Reading, I must order, that *Charles Lackington*, be remanded to the custody of the keeper of the debtor's apartment. *The prisoner was, accordingly, remanded.*

JUDGE VAN NESS's DECISION

ON THE MANNER OF RETURNING JURORS TO THE DISTRICT COURT OF NEW-YORK.

At the United States District Court, held in the city of New-York, in August last, by His Honor William P. Van Ness, a decision was made by him of the highest importance to the liberty, property and even lives of the citizens of the States who may be civilly or criminally prosecuted in the United States Courts.

It has been the practice of the Marshal of this District to select the jury, both as to the individuals who were to serve on it and the part of the District from which they were to come, at his own pleasure—In other words, it was completely in the power of the Marshal to return at any time

just such a jury as would answer the purposes of government, or of any of the officers of government having an interest in the cause to be tried. This power in the hands of a Marshal disposed to use it for improper purposes, is so manifestly dangerous to public liberty and private security, that Congress actually legislated on the subject, and directed that Juries should be returned from such part of the District as the Court should direct, so as should be most favorable to an impartial trial, and to avoid unnecessary expence, or unduly burthening the citizens of any part of the District with such services; and that they should be designated in each district respectively, according to the mode of forming Juries to serve in the highest courts of law therein, so far as such mode should be practicable. Notwithstanding these plain and positive directions of the act of Congress, the Marshal has for years persevered in summoning such jurors as he at his pleasure thought fit, and from such parts of the District as suited his own views of propriety or convenience.

In the causes of the United States against Mr. Coit, for an alleged breach of some bonds executed by him as surety, during the first embargo, and which were noticed for trial at the above Court, the counsel for the defendant, upon the District Attorney's moving to bring on one of the causes, filed a challenge to the array, because the Marshal had summoned the Jury of his own mere abitrary will and pleasure, without any designation by the Court of the part of the District from which they were to be summoned, and because the Jury had not been summoned according to the mode of forming Juries to serve in the highest court of law in this State, altho' it was practicable so to have summoned them. To this challenge the District Attorney demurred, and the defendant's counsel joined in demurrer.

The question was very fully argued by the counsel on both sides; and the Judge having taken time to consider of it, delivered his opinion in favor of the challenge, upon both

points. The array was accordingly quashed and the Jury discharged. The Judge had reduced his opinion to writing. It was very ably drawn up, and the subject examined and discussed with remarkable clearness, precision and force. He shewed, not only from the acts of Congress particularly applicable to this subject, but from a view of the whole judiciary system of the United States, that it was the intention of Congress to conform the proceedings of the United States Courts as nearly as possible to those of individual States respectively. By this decision, the valuable right of an impartial trial by jury, than which none is of more vital importance to the administration of justice, is secured to the citizens of this State in the District Court, whose rights are no longer left to depend upon the will of an individual, but on the due execution of those laws, which, calculated to guard against abuse and oppression, have provided in our State Courts for the selection of juries by ballot from all those who are qualified to serve.

It is proper here to add, in order to avoid mistake, that the counsel for the defendant did not impute to the marshal any improper conduct or design in summoning the jury in question, nor did the challenge involve any objections to the individuals composing the jury : It proceeded wholly upon the ground that the mode by which the jury had been summoned and returned was wrong in principle, and that the practice which had hitherto prevailed, was in violation of express and positive laws, whose strict observance was a matter in which even the humblest individual in the community had a deep interest.

Whilst we are on this subject, we avail ourselves of the opportunity it affords of correcting a mistake, which we find very often made by confounding Judge Van Ness of the District Court, with his Honor Wm. W. Van Ness, one of Judges of the Supreme Court of this State. Their christian as well as sirnames being alike, and the circumstance of their

being both Judges, occasions the frequency of the mistake, which we have thought it proper thus to rectify. Their names are only distinguished by a letter, *William P.* being the District United States Judge, *William W.* being a Judge of the Supreme Court of this State, and of which Court, highly respected for its learning and talents, he is a very distinguished member.

The counsel for Mr. Coit, were Messrs. Brinckerhoft, Wells, Colden, Hoffman and Emmett; and for the United States, Messrs. Sandford, District Attorney, D. B. Ogden and Baldwin.

CIRCUIT COURT OF THE UNITED STATES.

Pennsylvania District, October 7, 1813.

EXTRACTS FROM JUDGE PETER'S CHARGE ON THE LAW OF TREASON.

"The wise and virtuous framers of our constitution were aware of the evils attendant on multiplied items of charges which might be construed into *treason*. They knew the agitations into which free governments are liable to be thrown; and they endeavoured to guard, as far as human systems will permit, against the consequences of such agitations. In establishing a happy improvement of the system of government, they remained conscious they could not change the nature of man; prone, in the vicissitudes of power, to use for his own purposes the means which he reprobated while employed by other hands.

"By our constitution then it is declared, that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," &c.

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"By our constitution then it is declared, that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," &c.

"The law in regard to the point which I have deemed it necessary at this time to discuss, appears to be,

"1. Joining with enemies in acts of hostility, by sea or land, will make a man a traitor, under both the clauses of our constitution, relating to "levying war and adhering to enemies." But if this be done through fear of death (not slight apprehension) and while the party is under actual force, and he takes the first opportunity of escaping, he is excused.—But the mere apprehension of having houses burned or property destroyed, furnishes no ground of excuse.

"2. Furnishing enemies with money, arms, ammunition or other necessaries, will be *prima facie* evidence of treason. But if enemies come with a superior force, and exact contributions, submission is not criminal.

"As to remuneration, made and received, for plunder or any acts of violence—it must be left to the jury, as a fact of intention and precedent, exciting suspicion, but not absolutely conclusive.

"The bare sending money or provisions, (except under the circumstances before stated) or, worst of all, sending intelligence to enemies engaged in hostile operations, will amount to treason, in giving aid and comfort; though the money, provisions or intelligence be intercepted. The act was complete on the part of the traitor, though it had not the intended effect.

"Supplying with provisions or refreshments, hostile ships, fleets or troops, blockading our ports, and beleaguering and ravaging our coasts, is a most aggravated offence. It tends immediately and directly to promote and assist hostile operations, and is a species of aid and comfort, peculiarly deserving condign punishment. Intelligence given to such ships, fleets or troops is doubly reprehensible, for evident reasons.

"The merchants of an European nation who, in times long passed, supplied the enemy with gun-powder to batter down the walls of their own Cities, are hung up, by history, in everlasting infamy. Yet their cupidity and defection were not more base than are the conduct and motives of those who are now guilty of the offences I have just mentioned.

"Writing letters, containing intelligence of a hostile nature, and only putting them in the Post-Office, where they were stopped, has been adjudged to be treason, under the words, "giving aid or comfort." But merely expressing opinions, though they may be averse to public measures, (unless done with a view to influence and direct the enemy in hostile enterprizes) is not the kind of intelligence considered thus criminal; though it were better omitted.

"Necessary correspondence with an enemy is not treasonable, nor unlawful. The subject matter alone gives it a character. In our situation, epistolary correspondence, and other innocent intercourse, are indispensable to the business and affairs of those whose lawful pursuits and connexions have been suddenly and unexpectedly cut off by the war.

"Enlisting, or procuring persons to enlist in the service of the enemy, is treason—though no actual hostility be committed. But marching, or some other overt act must be shewn.

"Taking a commission to cruize in an enemy's ship against the United States is treason—if the party go on board that ship: which is an act of hostility, although he commit no other. So it is with an engagement in enemy's service, in any capacity, if there be any advance or overt act in execution of the agreement.

"6. A conspiracy, with intent to aid and comfort is not an overt act of adherence; unless aid and comfort be afterwards given. And then it is treason in every one of the

conspirators; for there are no accessaries in treason—all are principals, according to English authorities adopted here, though some respectable opinions are otherwise.

"7. Words or writings are not overt acts. But if such acts be afterwards actually committed by the party, they may be evidence of intention; upon which the jury must decide. Acts and not words, are the ingredients. Writings never promulgated are less than all evidence of treason—Algernon Sidney's case is well known. His sacrifice continues to excite unqualified detestation.

"8. Mere residence in a state of war is not of itself an act of adherence.

"9. There can be now no doubt of the meaning of the term "enemies," however it might have been, heretofore disputable."

IRISH COURT OF ROLLS.

Merry, vs. *the Rev. John Power, D. D, Titular Bishop of Waterford.*

The facts are as follow: In 1801, Mary Power made her will, bequeathing a considerable part of her property to the Rev. John Power, and others, in trust for charitable purposes. Her brother Joseph, then a merchant in Spain, was her next of kin and residuary legatee. He died intestate, and his son the now plaintiff, came over and took out letters of administration to his deceased father, and brought a suit in the Spiritual Court to set aside the will, as unduly obtained, and as disposing of a large property to Papists, and for superstitious uses. In that Court the plaintiff applied for an administrator, *pendente lite*, and was refused. The present

bill was filed praying that theeffects might be brought into Court. This bill was filed only a few weeks, and now, before the defendant had answered, a motion was made by Doctor Vavasour, for a receiver, that Doctor Power, the acting executor should be ordered, forthwith, to bring the effects into Court; he relied on the affidavit of his client, the plaintiff charging, that the Will was obtained by fraud by the defendant Power, and at best it could be sustained, as being a trust altogether for Popish uses. The motion was opposed by Mr. Prendergrast, who strongly argued against the imputations thrown out upon the conduct of Doctor Power, by the name of this "one John Power a Popish Priest." He insisted that, under the whole circumstances, there was no color for impeaching the transaction; that there had already been a decree of this Court obtained by the Trustees of Charitable Donations affirming the legality of the trusts, and that it would be unprecedented for a Court to interfere in this way, and before an answer come in, or any delay or resistance on the part of the defendant, to put in his answer. Other gentlemen on both sides argued very zealously for their clients.

His honor, Mr. Curran, said, that if the question had been brought forward upon the mere rule of the Court, he should not have thought it necessary to give many reasons for the order he intended to make, but pressed so strongly as it has been, both by the arguments themselves, and perhaps more so, by the style and manner of putting them, as well as the supposed policy which has been called in to aid them; I think, said his honor, I ought to state the grounds on which I mean to act in my decision—First then it is urged, that this is the case of an insolvent and wasting executor, having fraudulently obtained the Will. As to insolvency—to be an executor it is not necessary to be rich, integrity and discretion are the essential qualities—if an executor of humble means, this Court has no power to control him; he may bestow his property as a gift to whom he pleases.

It would be strange if he could not confide it as a trust to whom he chooses; I know of no necessary connexion between wealth and honesty; I fear that integrity is not always found to be the parent or the offspring of riches. To interfere, therefore, as is now sought with this executor, will be little short of revoking the Will. But it is said that this Will has been obtained by fraud, practised by this "John Power." No doubt this Court has acted where strong grounds of suspicion of fraud and danger of the property being made away with have appeared; but do these grounds appear to this Court?—Here his honor recapitulated the facts sworn to, and said, I see no semblance of facts to sustain such a charge. Who does this "one John Power, a Popish Priest," turn out to be? I find he is a Catholic Clergyman —a Doctor in Divinity, and the Titular Bishop in the diocese of Waterford.

And yet I am now pressed to believe that this gentleman has obtained this will by fraud. Every fact now appearing repels the charges; I cannot but say the personal character of the person accused repels it most strongly. Can I be brought, on grounds like these now before me, to believe that a man having the education of a scholar, the habits of a religious life, and vested with so high a character in the ministry of the Gospel, could be capable of so despicable a profanation as is flung out upon him! Can I forget that he is a Christian Bishop, clothed not in the mere authority of a sect, but clothed in the indelible character of the Episcopal Order, suffering no diminution from his supposed heterodoxy, nor drawing any increase or confirmation from the merits of his conformity, should he think proper to renounce what we call the errors of his faith? Can I bring my mind on slight, or rather on no grounds, to believe that he could trample under his feet all the impressions of that education, of those habits, and of that high rank in the sacred ministry of the Gospel which he holds, as to sink to the odious impiety im-

puted to him? Can I bring myself to believe that such a man, at the dying bed of his fellow-creature, would be capable with one hand of presenting the cross before her lifted eye, and with the other of basely thieving from her those miserable dregs of this world, of which his perfidious tongue was employed in teaching her a Christian's estimate? I do not believe it; on the contrary, I am (as far as it belongs to me in this interlocutory way to judge of the fact) as perfectly convinced that the conduct of Doctor Power was as it ought to be, as I am that the testatrix is dead. But, said his honor, I am called on to interfere, it being a foolish bequest to superstition and to popish uses. I have looked into those bequests; I find the object of them to provide shelter and comfortable support for poor helpless females, and clothes and food and instruction for poor orphan children. Would to God I could see more frequent instances of such bequests! Beautiful in the sight of God must it be—beautiful in the sight of man ought it to be, to see the dying Christian so employed—to see the last moments of human life so spent in acts of gracious benevolence, or even of interested expiation. How can we behold such acts, without regarding them as forming a claim, to, as springing from a consciousness of immortality? In all ages the hour of death has been considered as an interval of more than ordinary illumination; as if some rays from the light of the approaching world had found their way to the darkness of the parting spirit, and revealed to it an existence that could not terminate in the grave, but was to commence in death.

But these uses are condemned, as being not only superstitious but popish uses. As to that, I feel no disposition to the orthodox rapine of the living, in defeating even the heterodox charity of the dead. I am aware that this objection means somewhat more than directly meets the ear, if it means any thing. The objects of these bequests, it seems, are Catholics, or as they have been called, Papists; and the

insinuation clearly is, that the religion of the objects of this woman's bounty calls upon us to exercise some peculiar rigor of interference to abridge or defeat her intentions. Upon this point I wish to be distinctly understoood; I do not conceive this to be the spirit of our existing law, nor of course the duty of this court to act upon that principle in the way contended for. In times (thank God!) now past, the laws would have warranted such doctrines. Those laws owed their existence to unfortunate combinations of circumstances that were thought to render them necessary. But if we look back with sorrow to their enactment, let us look forward with kindness and gratitude to their repeal. Produced by national calamity, they were brought by national benevolence, as well as by national contrition, to the altar of public justice and concord, and there offered as a sacrifice to atone, to heal and cociliate, to restore social confidence, and to give us that hope of prosperity and safety, which no person ever had, or dared to have, except where it is founded on a community of interests, a perfectly even and equal participation of just rights, and a consequent contribution of all the strength of all the parts so equally interested in the defence of the whole.

I know they have been supposed to originate in religious bigotry—that is, religious zeal carried to excess. I never thought so. The real spirit of our holy religion is too incorruptibly pure and beneficent to be depraved into any such excess. Analyze the bigot's object, and we see he takes nothing from religion but a flimsy pretext in the profanation of its name; he professes the correction of error and the propagation of truth. But when he has gained the victory what are the terms he makes for himself? Power and profit. What terms does he make for religion? Profession and conformity. What is that profession? The mere utterance of the lips, the utterance of sounds, that after a pulsation or two upon the air, are just as visible and lasting as they are audible.

What is the conformity? Is it the practice of any social virtue, or christian duty? Is it the forgiveness of injuries, or the payments of debts, or the practice of charity? No such things. It is the performance of some bodily gesture or attribute. It is going to some place of worship. It is to stand or kneel, or to bow to the poor box—but it is not a conformity that has any thing to do with the judgment, or the heart, or the conduct. All these things bigotry meddles not with, but leaves them to religion herself to perform. Bigotry only adds one more, and that a very odious one, to the number of those human stains, which it is the business of true religion, not to burn out with the bigot's fire, but to expunge and wash away by the christian's tears. Such, invariably, in all countries, and all ages, have been the motives to the bigot's conflict, and such the uses of his victories—not the propagation of any opinion, but the engrossment of power and plunder of homage and tribute. Such, I much fear, was the real origin of our popery laws. But power and privilege must necessarily be confined to very few. In Ireland this was particularly the case. Religion was dishonored, man was degraded, and social affections were almost extinguished. A few, very few, profited by this abasement of humanity.

But, let it be remembered, with a just feeling of grateful respect to their patriotic and disinterested virtue, and it is for this purpose that I have alluded, as I have done, that few composed the whole power of the legislature which concurred in the repeal of that system, and left remaining of it not an edifice to be demolished, but a mere heap of rubbish unsightly, perhaps pernicious, to be carted away. If the repeal of those laws had been a mere abjuration of intolerance, I should have given it little credit. The growing knowledge of the world, particularly of the sister nation, had disclosed and unmasked intolerance; had put it to shame and consequently to flight! "But the public opinion may proscribe

I see the interest, the question has excited, and I think it intolerance, it cannot take away powers or privileges established by law." Those powers of exclusion and monopoly could be given up only by the generous relinquishment of those repealing statutes. Those lovers of their country saw the public necessity of the sacrifice, and most disinterestedly did they make it. If, too, they have been singular in this virtue, they have been singularly fortunate in their reward. In general the legislator, though he sows the seed of public good, is himself numbered with the dead before harvest can be gathered. With us it has not been so—with us the public benefactors, many of them at least, have lived to see the blessings of heaven upon their virtue, in an uniformly accelerating progress of industry and comfort, and liberality and social affection, and common interest, such as I do not believe that any age or nation has ever witnessed.

Such do I know was the view, and such the hope, with which that legislature, now no more, proceeded so far as they went in the repeal of those laws so repealed. And well do I know how warmly it is now remembered by every thinking Catholic, that not a single voice for those repeals was given, or could be given, except by a Protestant legislator. With infinite pleasure do I also know, and feel, that the same sense of justice and good-will which then produced the repeal of those laws, is continuing to act, and with increasing energy upon those persons in both countries, whose wisdom is likely to explode whatever principle is dictated by bigotry, or folly, and to give currency and action to whatever principle is wise and salutary. Such also, I know to be the feeling of every Court in this hall. It is from the enlarged and humanized spirit of legislation, that Courts of justice ought to take their principles of expounding the law. At another time I should probably have deemed it right to have preserved a more respectful distance from some subjects which I have presumed, but certainly with the best intentions and I hope no unbecoming freedom, to approach. But

right to let no person carry away with him any mistake, or to the grounds of my decision, or suppose that it is either the duty or the disposition of our Courts to make any harsh or jealous distinctions in their judgment, founded on any difference of religious sects or tenets. I think, therefore, the motion ought to be refused, and I think myself bound to mark still more strongly my sense of its impropriety by refusing it with FULL COSTS.

JUDICIAL RESIGNATION.

WOODVILLE, February 7th, 1814.

DEAR SIR,

By this letter I beg leave to announce to you, my resignation of the office of one of the Judges of the Superior Courts of Law and Equity for this State. It is, however, with some pain, that I feel myself bound, at this particular period, to impose upon your Excellency the trouble of appointing a successor to said office. I have long since determined to resign this trust, but considerations of various kinds, have hitherto prevented it; and I am conscious an apology is due from me, for making my resignation to you and not to the last Legislature, and hope a sufficient one will be found, in the consideration, that the Judges of this State have, for some considerable time, had under advisement, fifty or sixty cases, of great difficulty and much importance, which have heretofore been argued by counsel: That owing to the death of Judge Harris, and the peculiar situation of some of the Judges, I entertained the belief, that by remaining on the bench and attending the last Supreme Court, many (if not all) of these cases would be decided; whilst, on the other hand, by resigning to the last Legislature, it would

occasion delay, and perhaps another argument to the counsel concerned. I therefore was induced (contrary to my wishes) to attend the last Supreme Court, believing that the advantages arising to the citizens, would be greater than the inconvenience from my resignation at this time.

The change of the former judiciary system, at once imposed on the Judges a degree of fatigue and labor, and a great increase of expences. Hence, a reasonable expectation was entertained, by that Department of the Government, that succeeding Legislatures would be disposed, gradually to diminish their burthens. But the experience of years has fully shewn how fallacious this hope was: instead of a diminution of duty, continual additions have been making, until their situation has become insupportable. The change of the sys em, first increased the period of service from 10 or 12 weeks in the year, to the proportion of 25 or 26; but it was soon found necessary to compel the Supreme Court to sit twice instead of once a year, adding thereby a period of at least three weeks more. In the next place, to refuse the Judges the privilege of arranging their circuits in such manner as would or might be most convenient, but making it their positive duty to ride all over the State, which, on a very distant circuit, including the time of going to and returning from the last Court, will add, sometimes, three or four weeks more; next, to regulate the mode of doing business in the Supreme Court, by which great burthens have been placed on the Judiciary, requiring the opinions all to be written and filed before they adjourn; and lastly, by adding one more Court to the number now in existence. From an experience of several years, I know, within my own breast, that it is beyond the reach of my best exertions to perform all these duties.

I have, therefore, thought it unjust, iniquitous and dishonorable, longer to retain the office. Indeed, Sir, it must be admitted, that to discharge the duties required of the Judges

at the Supreme Court, in a manner to answer the public expectation, and to comport with the dignity of such a Court, would employ one set of Judges during the whole year.

Having, in this plain way, and candid manner, expressed to you the cause of my retiring from office, I beg you to accept this my resignation, and, through you, to offer my thanks and acknowledgements to the Legislature, for the notice and attention which they have bestowed upon me, and to assure them, that in every trust reposed in me, I have, to the best of my knowledge and ability, faithfully endeavored to discharge them.

You will please recollect that Edenton is the circuit assigned to me next, and where it will be the duty of my successor to attend.

With sentiments of respect, I am, Dear Sir, yours,

FRANCIS LOCKE.

His Excellency, WILLIAM HAWKINS.

ADJUDGED CASES.

SUPREME COURT OF NORTH-CAROLINA.

JANUARY TERM, 1814.

[LOWRIE, J. was absent the whole term, from indisposition—TAYLOR, C. J. was absent part of the term, from the same cause.

Thorn and Wife and others, v. *Williams.*

SEAWELL, J. delivered the Opinion of the Court.—This is a bill filed in the Court of Equity for the purpose of obtaining a rehearing of the probate of the will of Joseph John Hill, and also praying a discovery of a paper writing not proven, purporting to have been the will of said Hill.

The bill states, that the complainants, the children of Samuel Thorne, are the next of kin of the deceased, and were infants at the time of probate, and not parties. As to Thorne, it charges that he contested the will, and finally, to compose family disputes, withdrew his opposition, but without prejudice to the rights of his children. It further charges that the paper which has been proven as the will, was never intended as such by the deceased, but was written "*in fun, and just to be doing.* To this bill there is a general demurrer; and it is submitted to this Court to determine whether there be any ground stated in the bill to entitle the complainant to the assistance prayed for.

We will first premise, that whenever the principles of the law by which the ordinary Courts are guided, tolerate a right, but afford no remedy; or where the law is silent, and interference is necessary to prevent a wrong; or where the ordinary Courts are incompetent to a *complete* remedy, a Court of Equity will afford relief. So also, in cases where it is *essential* to a *fair trial* in the Courts of Law, a Court of Equity will lend *assistant* aid, by compelling discovery of matters necessary for that end; and in this respect she acts as the handmaid of the Law. But in no instance is it believed, a Court of Equity will interpose where the party applying has a fair and complete remedy at law. In the present case, the proceedings complained of are those of a Court of Law and are (if objectionable) either erroneous or irregular. If erroneous, theymaybe reversed. If irregular, it is competent and within thepractice of the Courts of Law to rehear upon petition, if a proper foundation be laid, as in the case of Stewart's will, decided in this Court. Without deciding whether the allegations set forth in the bill are sufficient either to reverse or rehear, we are of opinion there is no ground stated in the bill which makes it necessary for the interference of a Court of Equity. And as it does not appear that the paper sought to be discovered is in the possession of defendant, nor if discovered, is essential to answer any purpose, we are of opinion the bill should be dismissed and with costs.

Wright's Executars v. *Wright's Heirs.*

SEAWELL, J. delivered the opinion of the Court. This is an appeal from a new trial granted in the Court below, and is submitted to this Court without any statement. There is an affidavit which accompanies the record, by which it appears probable the party who prevailed on the issue, tam-

pered with the Jury. Whenever an appeal is made without presenting any point for the decision of this Court, there would then be no ground for disturbing the decision below. If the affidavit was the ground of the new trial, we should think thatthe matter set forth was a sufficient cause for it.

Orme v. *Smyth.*

SEAWELL, J. delivered the opinion of the Court. This is a motion to affirm the judgment of the court of pleas and quarter sessions of Jones County, in a case where the appellant omitted to file the transcript of the record, with the clerk of the Superior Court, fifteen days before the sitting of the term of the ensuing Superior Court.

The act of 1777, § 84, declares, that in case the transcript shall not be filed by the appellant at least 15 days before the sitting of the term of the Superior Court, the judgment shall be affirmed with double costs. The act of 1785 increases the penalty with 12 1-2 per cent. interest. By the 86th section of the act of 1777, it is provided that if it shall so happen that there shall *not* be thirty days between the last day of the term or rehearing in the County Court, and the next term of the Superior Court to which such appeal shall be made, then such appeal shall be continued, and a transcript &c. shall be filed the term succeeding that which shall immediately follow the County Court term. As these acts, therefore, are highly penal in damages, and deprive the appellant of all defence, it is the duty of the Court not to enforce them in any case but such as come expressly with in the letter.

Let it then be asked how many days there were between the last day of the term in the County Court and the term of the next Superior Court? It must be answered, only 29.

The proviso, then, upon that alternative, gives the appellant till the term next following. It is true the proviso says between the last day of the term or *hearing* in the County Court, and next term of the Superior Court; but it is not for this Court to withhold from the appellant, upon *construction*, a privilege which is expressly extended to him by *letter*, in a case so highly penal as the present: Wherefore, let the motion for judgment be overruled, and the cause placed upon the trial docket.

Williams v. *Holcombe.*

The defendant hired of plaintiff a negro boy, about 16 years of age, who was consumed by fire in the defendant's still-house, with its contents, which were valuable, the defendant with some difficulty escaping. In conversation afterwards, the defendant, in accountng for the misfortune, said, he supposed the spirits were losing between the two vessels, and the boy looked under to ascertain it, or to prevent it, when the fire communicated to the spirits.

The Judge informed the Jury, that if the time of hiring was not expired, the defendant was not bound, if he used ordinary care and attention, such as a prudent man would afford to his own property. On returning their verdict, the Jury said, that they were of opinion, that the time of hiring had not expired, and gave the plaintiff three months hiring, only, at the rate of four dollars per month, making six pounds. On a motion being made for a new trial, by the plaintiff's counsel, the defendant's council admitted that the damages in the second count, were too small, and offered to enlarge them to twelve pounds, or any sum the Court might think the evidence warranted. At the trial, and the return of the verdict, the defendant's council moved for a nonsuit, or arrest of judgment, on the second count. The Court

overruled the plaintiff's motion for a new trial, from which he appealed.

The defendant then renewed his motion for a nonsuit, or arrest of judgment, whichever might be deemed most proper; which latter part is referred to the Supreme Court — No advantage is to be gained or lost by priority of motion, or the order in which they are stated.

The verdict of the Jury is made another part of the case, and which is as follows: "Find for the defendant, on all the issues on the first count in the declaration; and on the second, they find that the defendant did assume for the hire of said negro for three months: that they find for the defendant in the other counts; and they further find that there is no accord and satisfaction and release, and assess the plaintiff's damages in second count to 6l. and costs.

The depositions of William Williams and Henry Speer, and a letter from Joseph Williams, the plaintiff, to defendant, and by him produced on trial, also made parts of this case.

It was admitted by plaintiff's counsel, that an additional hiring of three months was made by the plaintiff to the defendant, to commence at the expiration of the former hiring, and at the same rate of hire as the first; but he further stated, that the second hiring had elapsed six or eight days before he was burned to death.

It was stated by Samuel Speers, a witness on the trial, that about twilight of some day about the 3d or 4th of September, 1806 (not exceeding the sixth of the same month and year) when the boy, the defendant and a valuable negro fellow belonging to the defendant, were engaged in defendant's still-house, emptying brandy from the runlet, in which it was received from the still, into a larger vessel, the boy in question holding a candle for that purpose, when the spirits took fire and burned him to death and the negro fellow

belonging to the defendant, and all the property of the defendant's in the still-house.

SEAWELL, J. delivered the opinion of the Court.

The declaration in this case contains two counts, one to recover the value of the slave, the other to recover the hire.

As to the first, the Jury found that the time of hiring was *not expired*, when the accident befel the slave, and that the accident was not owing to the negligence of the defendant.

As to the other count, the Jury found for the plaintiff, and assessed damages to six pounds. From the evidence on the trial, the plaintiff (if entitled at all on that count) was entitled to about *twelve* pounds. The defendant's counsel offered to increase the damages to that amount.

At the return of the verdict, the defendant's council moved for a nonsuit, under the act of 1777, c. 2, § 10. The plaintiff not having recovered thirty pounds, to which it was alleged the jurisdiction of the Superior Courts was reduced by the act giving concurrent jurisdictisn with the County Courts, the plaintiff's counsel moved for a new trial, on the ground of verdict being contrary to law and evidence; and both questions are submitted to this Court.

As to the motion for a new trial, we are all of opinion that the whole circumstances of the case were properly left to the Jury, respecting the expiration of the time; and that the right of the plaintiff, in *law*, to recover, depending upon that fact, which the Jury have found against him; that in a case of doubtful evidence the Court should not disturb the verdict.

As to the motion for a nonsuit, the declaration shews the *nature* of the contract, and the verdict shews the *amount*, and both are within the jurisdiction of a Justice. The act of 1777 declares, that where the plaintiff in the Superior Court

shall recover less than fifty pounds, he shall be nonsuited; and the act giving concurrent jurisdiction to the Superior and County Courts, not having repealed that part of 1777, which relates to the nonsuit;—we are of opinion, that the plaintiff should have been nonsuited, and therefore that the verdict be set aside and a nonsuit entered.

Debow v. *Hodge.*

In the year 1783, John Debow, being seized of the tract of land described in the plaintiff's declaration, departed this life, having previously published, in writing, his last will and testament, which was admitted to probate after his death, and a copy thereof is sent up as a part of this case. His widow, Lucy Debow, qualified as executrix of the said last will and testament: Jacob Lake, appointed by the testator as one of his executors, never qualified as such, nor did he ever intermeddle with the estate of his testator, until after the intermarriage of the executrix, Lucy Debow, with one Robert Scoby; when the said Jacob Lake made sale of the said tract of land to George Hodge, the father of the defendant, and executed to him the deed of bargain and sale, a copy of which is sent up as a part of this case. Lucy, the executrix of John Debow, deceased, was then alive and did not refuse to execute said deed—the question submitted to the Supreme Court, is, "Whether the deed made by Jacob Lake to George Hodge, is good and valid, in law, to pass the fee-simple in the tract of land aforesaid, and bar the right of entry of the lessor of the plaintiff, who is the heir at law of John Debow, dec. If the Supreme Court be of opinion that the said deed is good and valid in law for the purpose aforesaid, judgment is to be entered for the defendant—if not, judgment to be entered for the plaintiff.

HALL, J. delivered the opinion of the Court.

In this case, the testator gives an authority to his executors to sell the land in dispute, and it is of no importance to consider whether that authority is given to them in the character of trustees or of executors; because, although in the first case the authority is annexed to the persons of the trustees, and if one dies before it is executed, it is gone, and the survivor cannot execute it; and in the latter case, the surviving executors may execute such trust. Yet it is indispensible that all the acting executors living at the time should join in such execution. In the present case, the deed was executed only by one of the executors, the other having qualified and being alive at that time. Nor can the defendant derive any aid from the statute of 21st Hen. viii. ch. 4; that statute only provides for the case where one executor refuses to intermeddle with the execution of the will, by enabling the other executors, who take upon themselves the burden of the executorship, to execute such authority by selling the land and making valid all sales by them so made. We therefore think judgment should be given for the plaintiff.

Bradley v. *Carrington.*

This was an action of Trespass, *vi et armis*, brought to recover damages for wrongfully imprisoning the person of plaintiff, and for wrongfully selling his property. The following were the facts:

The defendant, some years past, obtained judgment before a justice of the peace, against one Sherwood Allen and the present plaintiff. That judgment stood unrevived for five or six years, when defendant sold the judgment, as appears by an assignment upon its back, to one Michael Green—

Execution was taken out upon the judgment (still unrevived) by Green, in the name of Carrington, and levied upon the whole of plaintiff's property, and caused the same to be sold. Execution was then taken out by Green, in the name of Carrington, against the body of plaintiff, and he committed to prison, where he remained till his friends paid the money for him. It appeared also in evidence, that the judgment had been paid off by Sherwood Allen, and a receipt given by Carrington; that Allen had removed to the western country and carried the receipt with him, and had been gone some years before the date of the assignment to Green. The present plaintiff, Bradley, on the trial below, proved the fact of payment by Allen, and obtainedand produced the receipt to Allen. The Jury found a verdict for the plaintiff for $150; and a new trial was moved for upon the ground that the action should have been Case, and not Trespass; which was ordered by the Judge presiding to be transferred to the Supreme Court, to determine whether there shall be a new trial.

HALL, J. delivered the opinion of the Court.

The plaintiff has sustained a great injury in having had his property sold and his person imprisoned, to pay, not a debt which he or Allen owed, but to satisfy a demand founded neither in honesty or justice. We do not feel ourselves at liberty to attach any share of blame to Green, the assignee of the judgment, because he may have honestly purchased it. But, supposing this to be the case, he then became the innocent instrument of oppression in the hands of Carrington; and Carrington is fully as culpable in having caused Green to take out executions on the judgment which he sold to him, as if he had taken them out himself. And we are clearly of opinion, that wherea judgment has been satisfied, and that known to a plaintiff who takes out execution upon it, he is, in a moral point of view, just as culpable as where he takes out execution where there is no judg-

ment, and that fact known to him; in which case, we cannot doubt but an action of trespass would properly lie.

As to the point attempted to be made, namely, what is the remedy when execution is taken out upon a dormant judgment, we think it unnecessary to give any opinion.

Settle v. *Wordlaw.*

This was an action of detinue for a negro slave, Alfred, in the possession of the defendant. The plaintiff claims under the will of Josiah Settle, dec'd, a copy whereof is hereunto annexed, and agreed to be a part of this case. The testator died shortly after making said will; and his widow, Nancy, had the same duly proved and took out letters testamentary. The said Nancy then took the negro woman Fanny, in said will mentioned, into her possession, and continued the possession until she, the said Nancy, died, in 1812. She did not marry a second time. She assented to all the legacies in the said will given. The negro girl, Nanny, mentioned in said will, is the child of said Fanny, and the only one born before the testator's death. After the death of the testator, and during the life of his widow, the said Nancy Settle, the said Fanny had the following children, that is to say: James, Franky, Hannah and Alfred. The said Hannah lived three years, and died in the life-time of the said widow Nancy. The said Alfred is the slave now in dispute, and is the youngest child of the said Fanny; he was born in the life-time of the said Hannah.

The plaintiff is the testator's son, David, mentioned in said will. The testator's son, Benjamin, mentioned in said will, hath legally conveyed his estate held under said will, to the plaintiff.

The Jury found a verdict for the plaintiff; and the counsel for the defendant moved for a new trial. Whereupon the Court ordered the case to be sent to the Supreme Court. If the Supreme Court should think, upon the construction of said will, that the plaintiff is entitled to recover, then judgment is to be given for him; if he is not entitled to recover, then a new trial is to be granted.

SEAWELL, J. delivered the opinion of the Court.

From the will referred to in this case, it appears, the testator devised to his daughter Sarah a negro girl, Nanny, and to his wife a negro woman, Fanny, the mother of Nanny. By another clause, the testator devises to his daughter Nancy the first child Fanny should have; and in case Fanny has no other child, devises her to Nancy. By a further clause the testator devises in these words: "That if Fanny should have three children more, that they belong to my two youngest daughters, Sarah and Nancy, two a-piece, including Nanny already given; and all the rest (should she have more than three children, and my said daughters get two a-piece) to be equally divided between Benjamin and David." In the latter part of the will, the testator makes a further devise, as follows: "That should Fanny have three children, so that my two (evidently meaning two *daughters*) get two a-piece, then, at my wife's death, Fanny and the rest of her children to be the property of David and Benjamin."

The necessary effect of every devise or legacy is to vest immediately, if not controlled, or otherwise limited. As soon, therefore, as three children were born, they became vested in the daughters, and they then had, according to the expressions of the will, "two a-piece," including Nanny.

Fanny, and the rest of her increase, then became vested in Benjamin and David; which the after death of one of the issue of Fanny, then living, could not alter or affect; and

the widow, to whom Fanny's issue is devised, by implication for life, being dead, and it being stated in the case that Benjamin hath legally conveyed to the plaintiff, we are of opinion he is entitled to recover.

Allen v. *Martin.*

The writing on which this action is brought, is in the following words and figures: "Nine months after date, I promise to pay John G. Munrow, the sum of 210 dollars and 62 cents, it being for value received of him; as witness my hand and seal, this the 20th day of May, A. D. 1811." Signed, "John Martin, (*seal*)—Test. John Clark." On said note the following endorsement was made: "I sign over the within note to Hugh Allen, for value received of him, this 27th August, 1811, as witness my hand—John G. Munrow."

On the trial, it was alleged by the plaintiff, that Martin and Munrow, with an intention to defraud the plaintiff Allen, to whom Munrow was indebted, agreed to make and execute the note as above; that Martin, the obligor, should write the name of John Clark, the witness; and when so executed, that Munrow should endorse as above to Allen, the plaintiff, in satisfaction of the debt he owed him; but of this there was no direct and positive proof—indeed, no legal evidence.

The plaintiff then alleged, that the note was without a witness; offered to prove the hand-writing of the obligor, John Martin; and also offered to prove that the name of John Clark was in the hand-writing of John Martin, the obligor, and written by him for the purpose of effecting the fraud as above alleged. But, as it seemed agreed on all hands, that a man of the name of John Clark lived in the house of

Martin, in May, 1811, the Court refused the evidence until the absence of the said John Clark was accounted for. The Plaintiff then proved that a man of the name of John Clark, who had lived at the house of Martin, the obligor, in Iredell County, about the time the note was executed, had been seen in the neighborhood of Martin, after this suit was at issue; and the counsel of the plaintiff stated (and his statement was admitted as true) that he acted as agent in fact for Allen, the plaintiff, who lived in the State of Virginia; and that he had enquired after the same John Clark, and could not find out where he was, but had been informed that he had left the country.

It was then proved, that the supposed witness, John Clark, at or near the time of the trial, and for several months before that time (long enough to have procured his deposition, and within the knowledge of the plaintiff) had lived, and did live in the State of South-Carolina, not far from Winnsborough in that State.

The witnesses, who proved that a man of the name of John Clark had lived about the house of Martin, the defendant, also proved that he was not often publicly seen in the neighborhood. And two respectable witnesses swore, that they considered the said Clark as a transient person who occasionally came into the neighborhood and went off again; and was, in their opinion, of suspicious character.

Upon this evidence, the plaintiff moved the Court for leave to prove the hand-writing of John Martin, the obligor, and that he also wrote the name of John Clark; and though he had never issued a subpœna for John Clark the witness, nor had ever taken a commission for taking his deposition, the Court admitted him to do so. The plaintiff then produced and swore Andrew Carson and Samuel Wales, Esquires, who said on oath, that they had seen John Martin, the obligor and defendant, write; that they were acquainted with his hand-writing: and that they believed he wrote the note.

signed his name to the same; and that he also signed the name of John Clark, that appeared on the said note.

Upon this evidence, the Court admitted the note to be read, and directed a verdict for the plaintiff, subject to the opinion of the Court if such evidence was properly admitted; which was found and rendered accordingly. The Court doubting as to the admissibility of the evidence, orders this cause to be sent to the Supreme Court, for its decision

First, Whether a party is bound to take a commission and procure the deposition of an instrumental witness, who lives beyond the process of the Court (the place of his residence being known to him) before he can be admitted to prove his hand-writing? And,

Secondly, As this case is circumstanced, shall he do so; or may he prove the name of the witness written fraudulently by another person, without first procuring the testimony of the supposed witness, if probably known to him, as in this case?

SEAWELL, J. delivered the opinion of the Court:

An instrumentary or subscribing witness is required to be produced on the ground that the testimony of a person who has placed his name as attesting witness to a paper, can give more satisfactory evidence of its execution than any other; and not, as it is frequently said, that he is presumed to know the consideration on which it was given. As the rule holds as well where the question is simply as to its execution, as where an illegal consideration is alleged in the pleadings, and as long as that presumption holds, so long the rule prevails; but when it is destroyed, the next best evidence, of which the nature of the case admits, will be received. And that presumption may in various ways be destroyed; as, by proving that the witness is dead, or out of the reach of the process of the Court, or that diligent search

had been made for him, and that he cannot be found; in which cases, proof of his hand-writing may be made; also by proving that it is a fictitious signature, or that it is in the hand-writing of the obligor himself, or of the obligee, where the bond is assigned, as in the present case; in which latter cases, it is as if there was no subscribing witness; when evidence of the hand-writing of the obligor, as the best the nature of the case affords, would be proper. Thus we think that the Judge did right in suffering the bond to go to the Jury, independently of the circumstances of fraud arising out of the case, that it was a base contrivance between the obligor and obligee, to cheat and defraud some person by endorsing or transferring it. And we cannot forbear to observe, that if the facts stated in this case be true, we scarcely know more fit subjects for a criminal prosecution than the parties concerned. Let the rule, therefore, for a new trial be discharged.

Jones and others v. *Zollicoffer.*

It was moved by the defendant's counsel, that this bill be dismissed and stricken from the docket, because the complainants had, in proper person, dismissed the original bill, on which the bill of review had been brought; which dismission appears on the records of this Court, in the words following: "This bill is dismissed by the plaintiffs, in person"—said dismission appears on the docket of October term, 1800. A rule was made, on the defendants, to shew cause why the entry of dismission, appearing on the docket of October, 1800, should not be expunged, because made in vacation, and because not directed by all the complainants. Defendant shews cause, that the proofs are inadmissible to contradict the record. 2d. Insufficient to support the facts.

HENDERSON, J. delivered the opinion of the Court.

Two motions were made in this cause, in the court below. The first, by the defendant, to dismiss the bill; the second, by the complainants, to expunge an entry made in the original cause; and three points growing out of these motions, are referred to this Court. First, whether it is proper to expunge the entry of dismission, before mentioned? Second, whether parol evidence is admissible, to shew by whom, and at what time, the order of dismission was given, and at what time entered? And if the complainants should fail in either of those points, whether the motion to dismiss the bill, should be sustained? The papers heretofore filed in the office of the Clerk of this Court, and the decree of the Court when the cause was transmitted here before, are made parts of this case, so far as to explain the above points.

From these papers it appears, that this is a bill of review, brought to review a decree, made in a cause between the present complainants, and the defendant Zollicoffer and others, defendants; in which suit, certain issues formed between the complainants and the present defendant, were tried and found for the defendant, to wit; that he was a purchaser for a valuable consideration, and without notice; *and that he had purchased justifiably.* At the same term at which the issues were found, it was ordered by the Court that the complainants should pay to the defendant, Zollicoffer, his costs, and that the sheriff should sell sundry negroes in possession of the other defendants, and bring the money into Court, as preparatory to a further and final decree.

On the docket of the same term, it appears that the bill was dismissed by the order of the complainants—that a demurrer was filed to this bill, and the cause referred to this Court—that by the order of this Court the decree in the original suit was reversed, and the cause remanded to the Court below, to proceed to judgment—that the order of dis-

mission, beforementioned, did not appear in the copy of the original suit appended to the bill of review.

We think it necessary to examine the defendant's motion only. This motion is made to dismiss the bill, on the ground, that the original bill was dismissed by the act of the parties, and not by the decree of the Court; and had this objection been made at the proper time, and founded in fact, there is no doubt but that it must have been sustained; for a bill of review will not lie where the party himself dissmisses his bill; for it would be absurd for him to complain of his own act—besides, it would not conclude him, and he might begin *de novo*. But we are now precluded from examining this question, on a mere motion; for the Court, in reversing this decree, in the original suit, has passed on this point. It was brought before the Court by the demurrer; for if true, it was a reason why the bill should not be sustained. The Court has said it should be sustained, and reversed the decree. It is immaterial whether the objection was made or not. It was open to be taken, and the decree negatives all bars to it; and should the defendant think himself aggrieved, by the interlocutory decree of reversal, he may petition the Court to rehear it, but he cannot bring it before the Court by motion; nor does it vary the case that the entry of dismission did not appear in the copy appended to the bill of review. It was to review and reverse the decree in the cause remaining on record, or on file, that the bill is brought, and to that it refers; and should there be a variance between the copy and original, the latter must prevail. The variance, it is true, will incline a Court more easily to listen to petition to rehear, but it will not authorise the Court to dismiss on motion. But, was the defendant in time, we think, in fact, there was a decree, and such a decree as, according to the loose practice of the Courts of this State, would have concluded the defendant from bringing another bill for the same cause. It is admit-

ted, that were we to test this question by the strict rules relating to entries, which are observed in England, it would not be called a final decree. But we cannot shut our eyes against our knowledge of the loose manner in which business is transacted in our Courts, and of which we, ourselves, are a principal cause. In this case a material fact, as the parties thought, and, indeed, it may be said almost the only one relied on by the defendant's answer, was found for the defendant, and this under the order and direction of the Court—and whatever may be declared to be the correct practice at this day, at that time the Court had a principal hand in directing the issues. The Jury, even went further, and found that he justifiably purchased; thus finding both the law and the fact. The Court then ordered that the complainants should pay to Zollicoffer his costs; and in the order relative to the other defendants, preparatory to the trial of the cause, said nothing as to the defendant, Zollicoffer. We cannot but view this as a decree in favor of the defendant Zollicoffer, and that the order of dismission, which appears on the docket of the same term, applies to the other defendants, only; for as to Zollicoffer, it was unnecessary; the cause had been disposed of as to him.

We, therefore, think the motion to dismiss the bill should not be sustained.

Fox v. *Steele and Hauser.*

John Venables commenced an action, in the County Court of Stokes, against the plaintiffs. The cause was removed to this Court by a *certiorari* obtained by the plaintiff Venables. By an order of Court, the plaintiff, Venables, was directed to give bond and security, to prosecute his suit with effect, and did so—the defendants becoming his securities in said bond.

The question referred to the Supreme Court, is, "Will a *sci. facias* lie on the prosecution bond above described?

SEAWELL, J. delivered the opinion of the Court.

This is a *scire facias* against the defendants who became securities for the prosecution of a writ of *certiorari.* The plaintiff failed in his action, and it is contended that the bond is void, upon the ground the Court below had no power to require the plaintiff to give bond for the prosecution. That the act of the Gen'l Assembly had not directed the Clerk to take such security, and that the authority of the Court was usurped. It is also objected, that if the bond should be considered valid, it cannot be enforced by scire facias.

We are unanimously of opinion, that there is nothing in the first objection—that it is in the power of the Court, and that it is its duty to exercise it, in every case, upon application, where bond has been omitted by the Clerk, or where the obligors are insufficient.

As to the second objection, we are of opinion, that this bond not being matter of record, a *sci. fa.* will not lie, unless directed by statute; and that however general the practice may have been, and however convenient, yet in point of law it cannot be sustained, and that there be judgment for defendants.

Lester v. *Zachary.*

This was an action of debt, on bond, for 1000l. which is resisted on the ground of fraud and imposition, in obtaining the bond. Evidence of the inadequacy of the value of the bond, among other circumstances, to prove the fraud, was received by the Court.

HENDERSON, J. delivered the opinion of the Court.

In declaring that evidence of the inadequacy of the consideration of the bond was properly received on trial, it is not intended by the Court to countenance, in the most distant manner, an idea that the bond, for that cause, is invalid. The law is too well settled to the contrary, to permit that point to be even doubted; for, if a bond is good without any consideration, inadequacy of consideration cannot vitiate it. But where the contest is, whether the bond was ever made, or if formally made, whether under such circumstances of fraud and imposition as to render it void in law, inadequacy of consideration may be received as a circumstance to shew the truth of the defence.

With respect to the surprise disclosed in the plaintiff's affidavit, that he had been informed, by his counsel, that evidence of the above description was inadmissible, and that he was, therefore, unprepared to rebut it, it is to be lamented if the fact be so—but it is out of the power of this Court, without introducing a rule, pregnant with inconvenience, to remedy it. Surprise, in questions of law, arising at the trial, it is true, affords good ground for a new trial; but then the questions should be such as really afford room to doubt: If every mistake of counsel, however plain the point might be, afforded causes for new trials, applications of this kind might be without number. We, therefore, think that there should not be a new trial.

Gardner v. *Harrell et als.*

This was an action of trespass, assault and battery. The defendants plead the plea of justification, and attempted to give evidence of an arrest, under a State warrant, issued by a magistrate, for larceny. The warrant was delivered, by

the magistrate, to the plaintiff. The defendants, previous to the trial, were advised by their attorney, to give the plaintiff notice to produce the warrant, or they would give parol evidence of its contents. The defendants introduced a witness to prove the notice, who deposed, that the defendants had carried him to the plaintiff to take notice, and be a witness, concerning something in the case, but what it was the witness could not recollect, as it had entirely escaped his memory. The defendants failing to introduce evidence of notice, in consequence of which, the Court refused to receive any testimony in relation to the warrant, the plaintiff obtained a verdict for 150l. A rule for a new trial, on the annexed affidavit, being obtained, it was discharged by the Court, and an appeal taken to the Supreme Court.

SEAWELL, J. delivered the opinion of the Court.

This is an application to the Court, upon the defendant's affidavit to set aside a verdict which the plaintiff has obtained, and to accord a new trial, upon the ground, that injustice has been done the defendants, through surprise at the trial.

As the great object of a new trial is the attainment of justice, it rarely happens that Courts refuse their interference, where it appears necessary to effect that end. And it may be remarked, that it as seldom happens the party making an affidavit to obtain a new trial, omits any circumstance tending to shew he has merits on his side.

In this case, it is probable, the plaintiff was notified to produce the warrant on the trial, and that the witness, Hyman, had forgotten it when he gave his evidence. But it does not appear the defendants were deprived of any advantage. If they believed they would be able to justify, if permitted to prove the contents of the warrant, it was in their power to have stated it in their affidavit. If they exceeded their authority, the pretext of acting under the warrant

would aggravate the case. And without the Court's taking that for granted which does not appear, and which, if true, rests in the knowledge of the defendant, there are no grounds for setting aside the verdict.

Wherefore, let the rule for new trial be discharged.

Executors of Aaron Williams v. *Wells.*

Trespass *(quare cl. fregit.)* On the trial of this cause it appeared, that the defendant's entry and survey, were made previous to the entry and survey of the plaintiff—that the plaintiffs' grant of the land in dispute, was obtained previous to the defendant's.

On the trial the defendant offered testimony to prove (as he alleged) that there was fraud, on the part of the plaintiff in procuring his patent. Also, that the plaintiff's testator, Aaron Williams, was a deputy surveyor of said County, at the time of the survey and obtaining his patent.

The Court was of opinion, that the defendant would not be permitted to introduce any evidence of fraud, on the part of plaintiffs, and that the patents were the only testimony which would be received by the Jury. And as the plaintiff had a patent of a prior date, he was entitled to the lands in question, and also, damages for the trespass. It appeared, also, that the dates of the entries were inserted in the respective patents.

The Jury, however, found a verdict in favor of the defendant, upon the grounds, (as they declared) that the defendant, having made the first entry, was entitled to the land.

Upon a motion by the plaintiffs for a new trial, the questions arising out of the aforesaid facts, are reserved for the opinion of the Supreme Court.

COURT. The law is too clearly in favor of the plaintiff to admit of a doubt. Let there be a new trial.

Byrd v. *Rouse.*

This suit was brought to recover damages from the defendant for slanderous words, which was proved to have been spoken at four different times. In this case thirteen witnesses were introduced on the part of the plaintiff; whereupon the defendant moved the Court to order the fees of the supernumerary witnesses to be stricken out of the bill of cost.

HALL, J. delivered the opinion of a majority of the Court.

The act of Assembly made on this subject, declares that neither plaintiff nor defendant shall recover costs for more than two witnesses, where more than two shall be summoned to prove any fact. In the case before us, the plaintiff proved on the trial, as he had a right to do, the original speaking of the words, and the repetition of them at three other different times. Now it is not material, whether there were four different counts, on each of which damages were claimed, or whether there was one count only for the first speaking of the words, the damages on which was attempted to be increased by giving in evidence the repetition of them at other times; because proof of the defendant's having repeated them, is just as necessary in the one case as in the other. It therefore follows, that the plaintiff is entitled to recover the costs of eight witnesses—the two who proved the original speaking of the words, and two for each repetition of them afterwards. With respect to the number necessary for the plaintiff to introduce to meet the defence set up by the defendant, the Court cannot judge, not knowing what was proved by the defendant's witnesses. It seems that the Judge who pre-

sided allowed him to recover the costs of two witnesses; in doing so, we cannot say he erred. It may have been the case that it was only necessary for the plaintiff to prove one fact in answering the plea of justification; but if in answering that, or any other plea, it would have been necessary to establish several facts, he ought to be permitted to recover the costs of two witnesses for each fact, in case he introduced them to prove it, and more, if in the opinion of the Court, they were deemed necessary.

Jones v. *Crittenden.*

TAYLOR C. J. delivered the opinion of the Court.

The law of which the defendant claims the benefit, was passed in 1812, and provides that any Court, rendering judgment against a debtor for debt or damages between the 31st of December in that year and the 1st of February 1814, shall stay the same until the first term or session of the Court after the latter period, upon the defendant's giving two freeholders as securities. The act also contains sundry details not necessary to be recited.

In deciding the momentous question, whether the will of the legislature, as expressed in this act, be incompatible with the will of the people, as expressed in their fundamental law, the Constitution of the United States, we disclaim all right or power to give judgment against the validity of a legislative act, unless its collision with the constitution appear to our understandings manifest and irreconcilable. On the contrary, if patient and dispassionate consideration of the subject, produce any thing short of entire conviction, we hold ourselves bound to support a law.

The constitutional will of the legislature, inclination, not

less than duty, prompts us to execute; for identified as its members are with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare; or can result from other than the purest and most patriotic motives.

We have deliberately viewed the question in every light in which the arguments of the learned counsel on both sides have presented it, and aided by such additional information as our own research or reflection could furnish, the result of our opinion is, that the law in question is unconstitutional, and cannot be executed by the judicial department, without violating the paramount duty of their oaths, to maintain the constitution of the United States.

This conclusion we derive, first, from the plain and natural import of the words of the constitution of the U. States.

2. From a consideration of the previously existing mischiefs, which it was the design of that valuable instrument to suppress and remedy.

Amongst the important objects, which the people of the United States designed to accomplish by adopting the constitution, that of establishing justice, holds a conspicuous rank. This appears from the solemn declaration of the people themselves in the preamble to that instrument. The enlightened statesmen, by whom it was originally framed, had reaped abundant instruction from history and experience. Long accustomed to contemplate the operation of those master principles and comprehensive truths, which form, at once, the defences and the ornament of human society; and, which alone can justly form the basis of the social compact; they designed to give them practical effect for the benefit of the American people—to consecrate and make them perpetual. They well knew that while the prin-

ciple of justice is deeply rooted in the nature and interest of man, and essential to the prosperity of States, it forms the strongest and brightest link in the chain, by which the Author of the Universe has united together the happiness and the duty of his creatures.

To give a proper direction to these general principles, the clause in the constitution which presents the question before us, was inserted. Some of its provisions are transcribed from the articles of confederation; others are added because experience had demonstrated that without them the Union of the States would be imperfect. The words are "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, &c."

The obligation of a contract may be impaired by various modes and in different degrees; and the restrictive clause in the constitution does, according to our apprehension of its meaning, annul every act of a State legislature, which shall thereafter produce that effect, plainly and directly in any degree. When, therefore, the validity of the law is maintained by the defendant's counsel, because it does not allow a debtor, who promises to pay in one thing, to pay in another; because it does not absolutely restrain the debtor from paying according to his engagement: or, because it does not allow a third person to interfere between the contracting parties—the answer is, that the examples cited furnish stronger instances of a violation of the constitution than the case before us; they may with stricter propriety be called cases of annulling a contract; but they certainly do not prove that the obligation of contracts is not impaired by the act under consideration.

Whatever law releases one party from any article of a stipulation, voluntarily and legally entered into by him with

another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever correspondent to, and coextensive with the duty of the debtor. The first principles of justice teach us that he to whom a promise is made under legal sanctions, should signify his consent, before any part of it can be rightfully cancelled by a legislative act.

The binding force of a contract may likewise be impaired by compelling either party to do more than he has promised. If an act postponing the payment of debts be constitutional, what reasonable objection could be made to an act, which should enforce the payment before the debt becomes due? If, notwithstanding the constitutional barrier, it is competent for the Legislature to hold out to all debtors, that although they fail to pay their debts when they become due, and their creditors are in consequence compelled to sue them, they shall nevertheless be indulged with a certain time beyond the judgment, supperadded to the ordinary delays of the law; may not the Legislature, with equal authority, announce to all creditors the right of suing for their debts and enforcing payment before the day? Yet the rights of both parties established by the contract, are, in the eye of justice, equally sacred; and whether those of the creditor are sacrificed to the convenience of the debtor, or the subject be reversed, we are compelled to think that the constitution is overlooked.

No unimportant part of the obligation of every contract, arises from the inducement the debtor is under to preserve his faith. With many persons, and it may be hoped, the greater number, a sense of justice and respect for character, form motives of sufficient strength; but how rarely does it happen, that a man lending his money, or selling his property on credit, estimates such motives so highly as to deem them a safe and exclusive ground of reliance? In most cases he would reserve both money and property in his own

possession, were he not assured, that the law animates the industry and quickens the punctuality of his debtor; and that by its aid, he can obtain payment in six or nine months. Hence the well considered ceremonies of bonds, mortgages, and deeds of trust, more useful as the instruments of coercive justice, than as preserving the evidence of contract. The act under view destroys this assurance, and while it produces a state of things, the existence of which at the time of contract would have restrained the creditor from parting with his property, it encourages the debtor to relax his efforts to be punctual. It weakens his inducements to fulfil his engagement, and thereby impairs its obligation.

The right to suspend the recovery of a debt for one period implies the right of suspending it for another; and as the state of things which called for the first delay, may continue for a series of years, the consequence may be a total stagnation of the business of society, by destroying confidence and credit amongst the citizens.

An argument urged and much relied on by the defendant's counsel is, that the law in question bears only on the remedy and is therefore within the sphere of legislative authority. But if in so doing it violates the constitution, it is not less invalid, than if it directly touched and annulled the right. Every one will agree, that a law, which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution; that a law which should limit the recovery of all debts to so short a period after its passage, that it would be impossible, according to the course of the courts, to obtain a judgment, would also be null and void; though such laws, ostensibly, bear only on the remedy, yet they do in reality, annihilate the right. The law before us, it is conceded, does not go to the extent of either instance, yet it certainly diminishes the importance and value of the right. It is difficult to conceive how a law could otherwise impair an existing

right than by withholding the remedy, which is in effect to suspend the right.

The undoubted right of the legislature to alter and reform the judicial system may, it is said, produce delay in the execution of a contract, equal to that which results from the present law: and it is urged that all such acts must, upon the same principle, be declared unconstitutional.

We cannot acquiesce in the final conclusion drawn from these premises, which, without hesitation, we acknowledge to be correct.

All such laws, the Legislature have an unquestionable right to enact, a right which the people have never surrendered, and the exercise of which is not forbidden by the constitution of the United States.

But it must be considered, that the primary and essential object of all such laws, is the promotion of the administration of justice, its advancement and improvement. If delay grow out of them; if any thing that bears the semblance of a violation of contract follow in their train, it is merely the unintended incident and consequence of the exercise of a lawful authority. It is different with the law before us; its very design, as expressed in the title, is to do that against which the constitution has opposed its veto.

Many analogous powers, it is argued, have long existed in the State under the authority of the law; that their exercise has been highly convenient to the citizens, and has been universally acquiesced in; that all these must cease to have effect if the suspension law is unconstitutional, to the manifest detriment of the community.

If such effects follow from our decision, there are no citizens in the State who will more sincerely deplore them than ourselves. But we feel too deeply what we owe to the

responsibility of our stations, to the obligation of our oaths, and the rights of the people and their posterity, to be turned aside from what we believe to be the post of duty, by any consideration of the consequences that may arise from continuing in it.

Let all these cases be patiently examined, and we think it will be seen that their analogy is not complete; that they may still exist, and the powers under them be rightfully exercised, notwithstanding the decision in the present case.

The first instance is the stay of execution, which justices are allowed to grant on judgments rendered by them. But here the creditor is not concluded; he may appeal to the county court. Besides, the constitution of the U. S. in the section under consideration, employs the future tense, "No State shall pass laws," &c. It does not repeal those conflicting laws which were then in force; though several of the States did in obedience to its spirit, forbear to re-enact laws in hostility with it. The law giving this power to magistrates was enacted long before the constitution was adopted.

Another example cited is that of the power constantly exercised by a court of chancery, in giving time to a mortgagor, on a bill filed against him to foreclose, to pay the debt before the decree is made absolute, or the land ordered to be sold.

Such a power has been exercised by that Court from very ancient times, and was one of the modes of administering a remedy on those contracts, known to the parties when they entered into it, and it is a necessary consequence of the principles on which the constitution of the Court compels it to decide the rights of parties to a mortgage.

It is also in strict conformity with natural justice, for the land mortgaged being only a collateral security for the payment of the debt, and so understood by the creditor, he can-

not be injured if his debt and interest are paid. It is upon the same principle, that a Court of Chancery exercises its jurisdiction of relieving against a penalty; because it is designed to secure the payment of money, and the Court allows the creditor all that he expected when he made the contract. The intention of the parties is in all respects effectuated; and the obligation of the contract is enforced, precisely in the way, both creditor and debtor knew it might be enforced when they entered into it. Another point of view may probably render the subject clearer. Such an order in the Court of Chancery is not at all directed against the contract; but it is the answer of the Court to a mortgagee, who brings his bill against the mortgagor, on whom it prays the Court to lay hands, and make him if he intends to redeem, to do it then, or ever after remain silent. When the Court, therefore, is applied to for the purpose of lending its aid to an individual, in a matter which he deems necessary for his peace, it is clearly in its power to say upon what terms such interposition shall be extended. With the utmost propriety, then, the Court answers it cannot be that a decree of foreclosure shall be made in the case, without giving reasonable time to the mortgagor to redeem." If there are special cases in which a Court of Chancery gives further time upon a bill to redeem, it must be upon the ground that the substantial understanding and agreement of the parties is that of a security for the money and the interest accruing, without having reference to any particular day of payment, and that the safety of the debt is only intended to be provided for by the mortgage. Hence the mortgagee takes a bond for the debt, and the existence of the mortgage is no objection to the recovery of the debt. The giving further time on a bill to redeem has no influence on the bond, nor does it affect any proceeding to recover the debt in a Court of law. Both jurisdictions move distinctly within the sphere of their respective orbits. The Court of Equity applies itself to the conscience of the party, requiring of him

substantially to accept and perform what he originally expected, and what was intended by both parties; thereby enforcing rather than impairing the contract.

The act of 1789 has been pointed out to the notice of the Court, as containing a similar exercise of Legislative power with the one under consideration. That act provides that no execution shall be levied on property of a minor in the hands of his guardian, until twelve months after a judgment on the *scire facias*.

An examination of the purview of this law will shew that it is supplementary to the act of 1784, by which a remedy is given against heirs, not formerly possessed by the creditor. The heir was at first liable only where he was expressly bound in the obligation of his ancestor, and had also assets by descent. By these laws, which must be construed together, the land in possession of the heir is made liable to creditors after the personal estate is exhausted. That a new remedy given by the Legislature, should be qualified and limited in any way they deem expedient, seems perfectly unexceptionable. Besides, to whom is the indulgence extended? To minors, whose rights the common law, even to a greater degree than equity, has always considered as under its peculiar protection? Its language is "in the case of infants the parol is to demur, and the infant is not bound to answer till full age, and the register, parliament and common law give no execution against an infant heir, although the debt were clear and indisputable as by a judgment or statute" 2 *Treatise on Eq.* 268.

The right to pass this law is further derived from the 5th section of the Declaration of Rights, "that all power of suspending laws or the execution of laws, by any authority without the consent of the representatives of the people is injurious to their rights and ought not to be exercised."

This article, like several other excellent ones in the same instrument, is taken *mutatis mutandis* from the Declaration

of Rights, established by the Parliament of England at the beginning of the reign of William III, and was especially designed to secure them against a branch of prerogative, which though exercised by the regal authority, from the time of Henry III, had been employed in the preceding reign, in a manner the most odious and oppressive. With the example of the revolution in England, and the causes producing it, fresh in their remembrance, the convention of this State raised this bulwark against a similar assumption of authority. But the term "laws" must signify such acts as the Legislature have authority to pass, for that cannot be called a law, which the constitution has forbidden to be enacted. The term "suspend" implies hat the act suspended, once had an effectual and constitutional existence. So that if before the adoption of the federal constitution, the Legislature had passed an act inconsistent with the constitution of the State such act could not claim the authority of a law. If, for example, they had directed the judiciary to try all criminals without the intervention of a jury; if they had declared that certain acts theretofore done, and lawfully done, should nevertheless be punishable; that no prisoners should be bailable; it would, we apprehend, have been the sacred duty of the judiciary to refuse to exercute such acts. The persons who have filled that department, from the cessation of the colonial government to the present time, have acted in conformity with this principle, as the judicial records of the country testify. A law is defined a rule of action commanding what is right and prohibiting what is wrong. But the rule prescribed in the supposed cases, would have commanded what was wrong, and prohibited what was right, according to the fundamental law.

Every article in the Declaration of Rights as well as the constitution of the State, is subject to the paramount control of the constitution of the United States, which, being the last solemn expression of the will of the people, annuls and destroys every thing clearly irreconcilable with it.

The definition of a contract, as given by M. Pothier, a writer on the civil law, is quoted to shew that the time of payment is not of the essence of a contract. The writers on that law have made various subtle distinctions relative to the qualities of a contract; but as we cannot perceive that any inference can be drawn from the words of Pothier applicable to this subject, except such as other parts of the work explain away, a very brief notice of it will be sufficient.—His words are, "there are three different things to be distinguished in every contract; things which are of the essence of a contract, things which are only of the nature of the contract, and things which are merely accidental to it." After explaining at length the essence and the nature of the contract, he illustrates what he means by the accidental things, which, he says, are only included in the contract by express agreement. "For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it, without being particularly expressed." The just inference from this passage is, that even the accidental things, if inserted in the contract, form a part of its obligation. That the civil law viewed them in this light, is evident from other parts of the same writer, where he distinguishes between a term of right and a term of grace; the first making a part of the agreement, the latter not. 1 *Pothier, P. II, Cha.* 3. 131, *Evan's Translation.*

To this statement of the reasons why the analogy of the cases relied upon, appears to us imperfect, it is only necessary to subjoin this general remark, that none of them have been directly brought into judgment; and if they should appear to be infringements of the constitution, it cannot follow that the acquiescence in them will justify a repetition. The construction we give to the constitution would have been

adopted by us from a consideration of the instrument itself; but we think it fortified by the collateral illustrations furnished by the other ground of our opinion.

2. It is to be seen in the historical records of some of the States, that, pressed and exhausted by their efforts in the great struggle for independence, they had recourse to various expedients to relieve their suffering citizens. In addition to the issue of bills of credit and paper money, some laws were passed wholly changing the nature of the contract; others postponed the payment of debts, by authorising it to be made in instalments. The benefit resulting from these measures was partial and temporary; but the evil, as might have been expected, universal and permanent. Testimonies of this might be adduced from various authorities; but it may be sufficient to cite the work of the able historian of South-Carolina, whose various labors in the cause of literature, entitle him to the gratitude of the country. As the work of this gentleman may not be in the hands of every one who may desire to know the grounds of our opinion, such parts of it will be transcribed as immediately relate to the subject.

"The people of South-Carolina had been but a short time in the possession of their peace and independence, when they were brought under a new species of dependence. So universally were they in debt beyond their ability to pay, that a rigid enforcement of the laws would have deprived them of their possessions and their personal liberty and still left them under incumbrances; for property, when brought to sale under execution, sold at so low a price as frequently ruined the debtor without paying the debt. A disposition to resist the laws became common. Assemblies were called oftener and earlier than the constitution or laws required. The good and evil of representative government became apparent. The Assemblies were a correct representation of the people. They had common feelings, and their situation

was in most cases similar. These led to measures which procured temporary relief, but at the expence of the permanent and extended interests of the community. Laws were passed in which property of every kind was made a legal tender in the payment of debts, though payable according to contract in gold or silver. Other laws installed the debt, so that of sums already due, only a third, and afterwards only a fifth, was annually securable in law." After stating the emission of paper money he proceeds thus :

"The effects of these laws interfering between debtors and creditors were extensive ; they destroyed public credit and confidence between man and man, injured the morals of the people, and in many instances ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward. The procrastination of payment abated exertions to meet it with promptitude. In the mean time, interest was accumulating and the expences of suits multiplied by the number of instalments." He then states the necessity of the constitution of the United States, the objects provided for by it, and particularly recites the clause under consideration ; after which he proceeds : "Their acceptance of a constitution, which among other clauses contained the restraining one which has been just recited, was an act of great self denial. To resign power in possession, is rarely done by individuals, but more rarely by collective bodies of men. The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years ; for in them she passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future Legislatures, so as to deprive them of the power of repeating similar acts on any emergency, was a display both of wisdom

and magnanimity. It would seem as if experience had convinced the State of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used." Upon examining the laws of South-Carolina, it appeared that the last act alluded to by the historian, as interfering between debtor and creditor, was passed the 4th November, 1788. It provides that all debts (with various exceptions) contracted previous to the 1st Jan. 1787, shall be recoverable in instalments, only one fifth to be payable annually on the 25th March in each succeeding year, until the whole is paid. The law also authorises the creditor to demand security.

In the course of an animated picture, traced by the historian, of the effects of the new constitution, he remarks—"Public credit was reanimated. The owners of property and holders of money, freely parted with both, well knowing that no future law could impair the obligation of contracts."—2 *Rams. Hist. S. C. pa.* 433. In page 440, the same author, in describing the effects of the embargo of 1807, remarks: "Though the prohibition of exporting the valuable commodities of the country, reduced their price one half, yet the Courts and the Legislature firmly resisted all attempts to obstruct the legal course of justice in favor of debtors. The forbearance of the creditor part of the community generally afforded a shield to property bound by judgments and executions, which without violating the constitution, protected it more effectually than the instalment laws, which had been too easily passed in the period of disorganization preceding the establishment of energetic government in '89."

No comment on these extracts is necessary to prove that, in the opinion of the writer, the instalment law could not have been re-enacted after the adoption of the constitution. They may also be fairly considered as furnishing evidence of the sentiments of a respectable State on the same subject, expressed at two different periods, a state which has always

abounded with able men at the bar, on the bench and in the legislature.

The same opinion is to be collected from the debates in our convention in 1788, as having been entertained by some eminent citizens, who assisted in forming the constitution, and were present at all the discussions it underwent in the general convention. Whoever will compare an instalment law with a suspension, at the time of their enactment, will probably be induced to give the preference to the former, in relation to the rights of a creditor, and to conclude, if the former violates the constitution, *a fortiori* the latter does so.

We have thus given the reasons of our opinion, with as much clearness and brevity as the many important causes pressing upon our attention would enable us to do in the intervals of adjournment. For, until the present term, we knew not the opinions of each other. We should have rejoiced if this judgment could have been put in a course of revision before a superior tribunal, or that so interesting a question could have been decided, for the first time, by Judges of more skill and learning than we pretend to possess. Such as it is, we submit it to the candor and good sense of our fellow citizens, who although they may think us in error, to which we are subject in common with the rest of the human family, will do us the justice to believe that such error is neither wilful or agreeable. We have discharged what we believe to be an imperious duty to our country, and the *mens conscia recti* forms our consolation and support.

AN ABRIDGMENT

OF THE

ACTS OF THE GENERAL ASSEMBLY.

PASSED IN 1813.

An Act to continue in force an act passed at the last session of the General Assembly, entitled "An act to suspend Executions for a time therein limited."

§ 1. Executions stayed under the act of last session are entitled to a further stay until the 1st of July next, on giving security.

§ 2. Clerks to issue execution after that day for debt and interest.

§ 3. Justices, on application, also to issue executions after said first of July.

§ 4. Where judgments have been obtained against more than one person, all the defendants must apply before the stay can be granted.

§ 5. The costs to be stayed with the judgments.

An Act to provide for the better accommodation of the Governor of this State.

§ 1. Commissioners are named for designing and erecting on the public lands near Raleigh, a suitable house, &c. for

the Chief Magistrate of this State, and for raising the necessary funds.

§ 2. The Commissioners are to sell Lot No. 131 in the city, and the public lands on the north, the west and south sides of the city, not east of Person-street or Sugg's branch.

§ 3. They are to lay off the land into convenient lots, and also the lot No. 131 into building lots.

§ 4. When the lots are laid off, the Commissioners are to value them and lodge the valuation, which is not to be made known, with the Public Treasurer.

§ 5. They are to lay off not less than six, nor more than ten acres for the accommodation of the Governor.

§ 6. The lots are to be put up to auction, first giving sixty days notice of the sale; but the Commissioners are to prevent them from being sold for less than the valuation. The four unappropriated lots in the corners of the city are not to be sold.

§ 7. The purchasers are to have a credit of six months for half and twelve months for the remainder of the purchase money; and possession of the city lot is not to be given until the new house is ready for the Governor's residence. The credit on it to be extended to six months beyond that period.

§ 8. Springs to be reserved for public use.

§ 9. The principal building for the Governor's residence to be of brick or stone—the whole cost not to exceed 5,000l. No contract to be entered into for the buildings, except the proceeds of the sales shall be sufficient to meet the expense.

§ 10. Commissioners to report to the next General Assembly; and when the buildings are completed, to pay any balance remaining in hand into the Public Treasury.

An Act to authorise the Public Treasurer to borrow money for the purpose of providing means of public defence.

The Treasurer is directed to borrow from one or more of the Banks of this State, 25,000 dollars, at a rate of interest not exceeding 6 per cent. which shall be expended under the direction of the Governor, in the purchase of arms and munitions of war, and in providing other means of public defence other than fortifications.

An Act to provide means to furnish supplies for the militia which may be called into the service of the State during the year 1814.

In the event of the militia being called into the service of the State during the year 1814, the Public Treasurer, under the direction of the Governor, is to borrow of one or more of the Banks of this State, such sums as in the opinion of the Governor the exigency may require, not exceeding 50,000 dollars, for the purchase of supplies for such militia, and at an interest not exceeding 6 per cent.

An Act to amend the laws now in force relative to the Supreme Court.

§ 1. The Clerk of the Supreme Court is authorized to publish, on his own account, the Reports of cases argued and determined in said Court: Provided he secure to the use of the State sixty two copies thereof, to be delivered in two years from the present time, to the Secretary of State, who shall cause the same to be distributed by the Public Printer, with the laws and journals, to every county court clerk for the use of the several counties.

§ 2. If the Clerk of the Supreme Court accepts of these terms, he shall execute and deliver a bond to the Secretary

of State, payable to the Governor, for 500*l.* for the due performance of his undertaking.

An Act for the removal of certain suits in the Superior Courts of Law and Equity of this State.

The parties to any suit in any of the Superior Courts of Law or Equity may remove such suit, by consent, for trial to any convenient county; which removal is to be entered of record, and the Clerk shall transfer the papers of such suit, as in causes removed by affidavit of either party, and for which he shall receive a like compensation.

An Act concerning the boundary between this State & the State of South-Carolina.

Commissioners appointed on behalf of each State met on the 20th of July last, near the termination of the line of 1772, for the purpose of carrying into effect the articles of a conventional agrement entered into in the year 1808, and ratified by the Legislature of each State; but not being able to agree upon a boundary line according to the meaning of the 8d article of said agreement, did on the 4th of Sept. last, agree to recommend to the Legislatures of their respective States, the following as a substitute:

"From the termination of the line of 1772, a line shall be extended due west to the ridge dividing the waters of the north fork of Pacolet River from the waters of the north fork of Saluda River; thence along the said ridge to the ridge that divides the Saluda waters from those of Green River; thence along the said ridge to where the same joins the main ridge which divides the eastern from the western waters, and thence along the said ridge to that part of it which is intersected by the Cherokee boundary line run in

the year 1797; from the centre of the said ridge, at the point of intersection, the line shall extend in a direct course to the eastern bank of Chatooga River, where the 35th deg. of North Latitude has been found to strike it, and where a Rock has been marked by the aforesaid Commissioners with "Lat. 55°, 1818." It being understood and agreed that the said lines shall be so run as to leave all the waters of Saluda River within the State of South-Carolina; but shall in no part run north of a course due west from the termination of the line of 1772.'

The said provisional article of agreement is ratified and confirmed.

An Act further to provide for widows of persons dying intestate.

In cases where a person dies intestate, leaving a widow who shall petition for her year's provision, and there is not a sufficiency of crop, stock and provisions on hand, the commissioners shall estimate the value of a year's provision for said widow and family, and make return thereof to the next Court, whose duty it shall be to decree that the same be paid by the administrator, who shall be allowed for it in the settlement of his account.

An Act to amend an act, entitled "An act concerning proving wills and granting letters of administration, and to prevent frauds in the management of intestate's estates.

When an executor resides out of the State, the Court before which the will shall be offered for probate, shall cause such executor to enter into bond in double the supposed amount of the personal estate, for his faithful administration

of the estate; and until such bond be executed, such executor shall have no power to act; and the Court of the County in which the testator had his last residence shall proceed to grant letters of administration with the will annexed, which shall be in force until said bond be given. Such bond to be given within one year and not afterwards. And all executors heretofore appointed residing out of this State, shall within 12 months, enter into bond, or all their power as executors shall cease, and the Court before which the will of the testator was proved, or shall be proved, shall grant letters of administration on his estate with the will annexed to some discreet person or persons. This act not to affect the rights of an executor so far as relates to his undertakings for his testator or his power of retainer.

An Act to amend an act passed in 1810, entitled "An act to amend an act passed at the last session, entitled, An act granting to the several counties in this State, all fines, forfeitures, amercements and tax-fees, for the purpose of paying the expence of state prosecutions and contingent charges of the counties."

If any Clerk and Master in Equity fail or neglect to pay over to the County Trustee the tax fees on suits in equity, he shall forfeit the same sum that the Clerks of the Superior Courts of Law forfeit in similar cases.

An Act to raise a Revenue for the payment of the civil list and contingent charges of Government for the year 1814.

§ 1. One shilling on every 100 acres of land, three shillings on every hundred pounds value of town lots with their improvements, whether the town is established by law or not, and three shillings on every black poll, shall be collected this year.

§ 2. The owners or keepers of stud horses and juck-asses to pay the sum which they ask for the season of one mare.

§ 3. All free males between the ages of 21 and 50, and all slaves between the ages of 12 and 50, shall be subject to a poll-tax. All slaves to be listed in the county where they reside. The clerks of courts, in their returns to the Comptroller, to distinguish the number of white from that of black polls.

§ 4. Hawkers and pedlars of goods, not the manufacture of the United States, to pay a tax of three pounds for each county in which he shall sell goods; and every person who shall peddle or hawk goods on any navigable stream, shall pay a tax of ten pounds. Persons hawking goods, without having previously paid this tax, shall be liable to a forfeiture of 50l. one half to the State and the other half to the Sheriff.

§ 5. Wholesale merchants to pay a tax of eight pounds, and retail merchants three pounds—the stores to be given in in the list of taxables. Persons keeping stores for less time than a year, to be liable to the tax. Dealers in spirits not liable, except they sell other goods.

§ 6. Owners of billiard tables to give them in with their taxables, and to pay a tax upon them of thirty-five pounds; and the tax to be collected though the table was not erected on the 1st of April.

§ 7. Every company of itinerant stage players, rope-dancers, tumblers and wire-dancers, and each and every person or company who shall exhibit natural or artificial curiosities of any sort or kind for a reward, shall pay a tax of five pounds. Persons exhibiting without having first paid this tax, to be liable to forfeit 30l.

§ 8. Money remaining in the Treasury after payment of the civil list and other specific appropriations by law, is de-

clared a contingent fund, to be applied to the incidental charges of government.

§ 9. A tax of fifty shillings is laid on all gates erected across any public road, and the owners are to give them in with their other taxable property.

An Act to extend the time for securing entries of land.

Entries of land, which have been paid for since the 1st of January, 1806, shall have till the 15th December, 1815, for surveys to be made and returned to the Secretary's office.

An Act to amend the Militia Laws of this State.

§ 1. In case of invasion or insurrection, the militia officer highest in command in the county where it shall happen, shall immediately take measures to repel such invasion or to suppress such insurrection, and to give notice thereof to the nearest general officer, who shall send express to the Governor with the information. In the mean time the General shall take the most effective measures, and the militia thus called out shall be armed according to law.

§ 2. Nothing in the 5th section of the act of 1806 for revising the militia laws relative to the infantry, shall prevent any officer from training his corps according to the discipline established in the U. States army.

If no opportunity offers of forwarding orders or returns, the officer issuing the order or making the return, shall lodge the same properly directed in the post-office, marked "*Public service*," under which shall be written his name and grade.

§ 4. No appeal shall be granted from a company court-martial to a regimental court-martial, unless security shall be given to abide by the decision of such court-martial.

§ 5. The militia, when called into the service of the State, both officers and men, shall receive the same pay and rations as when called into the service of the Unitsd States.

§ 6. The Governor may mitigate or remit fines and penalties recovered in courts of justice against any general officer, arising under any of the militia laws.

§ 7. The commanding officer of each regiment or battalion shall give to the commanding officers of companies under his command, not less than ten days notice of battalion or regimental reviews.

§ 8. The Governor may appoint a general staff; and the officers thereof shall be governed by such regulations and perform such duties as may be prescribed and assigned to them by him.

§ 9. The Adjutant-General shall compile the several acts and parts of acts in force relative to the militia, and cause the same to be printed in a pamphlet, with the act of Congress of 1792, which shall be distributed, one copy to the commanding officer of each company, by the public printer, with the laws and journals.

§ 10. The Colonel of each regiment shall call together, at the usual place of regimental musters, all the officers of his regiment, & such parts of the non-commissioned officers and musicians as he may deem requisite, at least three and not exceeding six days every year, for the purpose of mustering and training and establishing uniformity of discipline; and such officers shall attend in full uniform, and equipped with a musket and bayonet or firelock, cartouch box capable of containing 24 rounds, and 12 cartridges. Officers of rifle

corps to appear armed with a good rifle, shot pouch and powder-horn, and 12 rounds of powder and ball.

§ 11. And the Brigadier-General of each brigade shall, once in two years, call together at some convenient place within their respective counties, all the officers of such county (cavalry officers excepted) for the like purpose. And said Brigadier-General shall muster or cause to be mustered, trained and exercised, said officers at least three days, and not more than six days. And each Major-General shall, at least once in four years attend the musters of the officers composing their respective divisions. Officers failing in their duty to be subject to the following fines: a Major-General $60, a Brigadier-General $50, a Colonel $40, a Major $30, a Captain $20, a Lieutenant or Ensign $15, a non-commissioned officer or musician $5.

§ 12. Every part of the acts of Assembly relative to the Infantry, which can be applied to the government of the Artillery, Light-Infantry, Grenadiers or Riflemen, are to be in force against them.

§ 13. If any non-commissioned officer or private, while in the service of the State, shall desert, or abandon the post assigned him, and being thereof convicted, shall forfeit the pay and emoluments due to him, and be subject to a fine, not less than 20, and not exceeding $50, and imprisonment not exceeding six months, nor less than one month, and turned over to serve as a private soldier in the Army of the United States, at the discretion of the court-martial, not exceeding double the term of time which he had been called to serve in the Militia.

§ 14. When an officer, under the grade of a field officer, or any non-commissioned officer or private, shall be charged with an offence, or the omission of any duty, the commanding officer of the regiment or battalion, shall forthwith cause

a court-martial to be convened, to investigate and try the same, and give judgment accordingly.

§ 15. The 21st 28th and 29th sections of the act of 1806 to revise the militia laws relative to the Infantry; the 9th and 10th sections of the act of the same year to revise the militia laws relative to the Artillery, Light-Infantry, Grenadiers and Riflemen; the act of 1807 for expediting the organizntion of the quota of militia required from this State by the General Government; and the 3d 4th 5th 11th and 14th sections of the act of 1812 to amend the militia laws, and all other acts or clauses of acts contrary to this act, are hereby repealed.

§ 16. The uniform prescribed for the officers of the United States, shall be the uniform worn in future by the officers of this State; but officers who have already equipped themselves in uniform, shall not be compelled to purchase others.

An Act to amend the several acts regulating the inspection of Flour in this State.

§ 1. Within twenty days after the 1st of January next, the Governor shall appoint two persons of good repute and skilful judges of flour to act as Inspectors of flour in the town of Fayetteville; and one person of the same description in the city of Raleigh, who shall inspect flour under the same rules, &c. as are prescribed for inspectors of flour in this State.

§ 2. It shall be lawful for the master, owner or commanmander of any boat or craft to receive on board for transportation from Fayetteville to Wilmington any flour not inspected and branded.

§ 3. The several degrees of flour shall in future be distinguished as follows: Superfine, Fine and Cross-Middling. Inspectors of flour shall conform their inspection as near as may be to the inspections of the adjacent states.

§ 4. Each inspector shall receive from the owners of the flour which he inspects 5 cents for each cask, and no more.

An Act to amend an act, entitled "An act directing how persons injured by the erection of Public Mills shall in future proceed to recover damages."

§ 1. Owners of lands which shall be overflowed from the erection of mills for domestic manufactures, or other purposes, shall have the same remedy as is given by the said act in relation to grist mills.

§ 2. In cases of appeal from the county to the superior court, the trial in the superior court shall be had at bar.

§ 3. The venire issued to the Sheriff upon application under the before recited act, shall command him to summon 24 jurors, from whom 12 shall be drawn as the jury to make the enquiry directed by the said writ. Each party may challenge either peremptorily or for cause.

An Act to amend an act, entitled "An act to empower the several County Courts of Pleas and Quarter Sessions of the several Counties in this State to order the laying out Public Roads, and to establish and settle Ferries, and to appoint where Bridges shall be built, and to clear inland Rivers and Creeks."

§ 1. The County Courts shall not appoint or settle any ferry, order the laying out of any public road, or discontinue or alter roads, but upon petition in writing, and unless

the petitioners make it appear that twenty days notice have been given to all persons interested within two miles of such ferry or road.

§ 2. If any person shall be dissatisfied with the decree of the Court, an appeal may be had to the Superior Court, on giving bond with sufficient sureties. The Superior Court is not to interfere in fixing the rates of ferriage or tolls, or the distribution of working hands.

An Act to amend an act passed in the year 1812, entitled "An act requiring notice of their appointment to be given to Overseers of Roads, Rivers and Creeks."

§ 1. The Sheriffs shall apply at the County-Court Clerk's office within ten days after the rise of each Court for the said orders, and shall, within twenty days, serve each person appointed Overseer with a copy thereof, or leave it at his usual place of residence, and return another copy to the next County Court.

§ 2. Clerks or Sheriffs failing or neglecting to perform his duty in this respect, shall, on conviction, forfeit the sum of 5l.

An Act authorising and empowering the Secretary of State to transcribe certain old Books in his office, and for other purposes.

The Secretary is to transcribe in a well-bound book or books, an old book in his office containing records of grants and patents commencing from 1734 to 1769, and when the copy is examined and found to be correct, the original shall be carefully packed up and deposited among the archives of the State; and copies taken from the transcript shall be held as valid as if taken from the original.

§ 2. Book No. 15, containing grants from 1772 to 1774, to be rebound in the Secretary's office and in his presence.

§ 3. The Secretary to be allowed for transcribing and examining the books aforesaid, and for indexing book No. 13, and for indexing the book containing Armstrong's entries, 175 dollars and 50 dollars as Librarian, according to the act of last session.

§ 4. The act of 1809, giving further time for the probate and registration of certain deeds issued from Lord Granville's office, is to continue in force for two years to come.

An Act to establish a Superior Court of Law and Court of Equity in the County of Haywood, and for other purposes.

§ 1. A Superior Court to be held at the court-house in the County of Haywood, on the second Monday after the 4th Monday in September next, and on the second Moday after the 4th Monday in March and September thereafter.

§ 2. The County of Haywood shall form a part of the sixth circuit, and the Judge and Solicitor who may attend the Superior Courts in the said County, shall be entitled to the same pay for this as for the other counties.

§ 3. The Superior and County Courts of Haywood shall exercise the same powers, &c. as those of the other counties. Nothing in this act to give the Superior Court jurisdiction of any road in the county, except the main road leading from Asheville to Waynesville.

§ 4. Prescribes the manner of appointing Clerks and Jurors to be as in other counties.

§ 5. Prescribes how causes shall be trasferred from Buncombe county to this county, and extends the provisions of

the amendatory and supplementary act of 1806, for the appointment of Jurors, &c. The neglects and failures of the several court officers to be subject to the usual fines, and entitled to the usual fees.

§ 6. The Superior Courts of the following counties, after the next spring circuit, shall be held at the times hereafter mentioned: Rutherford Superior Court on the 3d Monday after the 4th Monday in September next, and on the 3d Monday after the 4th Monday in March and September thereafter; Lincoln Superior Court on the 4th Monday after the 4th Monday in September next, and on the 4th Monday after the 4th Monday in March and September thereafter; Iredell Superior Court, on the 5th Monday after the 4th Monday in September next, and on the 5th Monday after the 4th Monday in March and September thereafter; Cabarrus Superior Court, on the 6th Monday after the 4th Monday in September next, and on the 6th Monday after the 4th Monday in March and September thereafter; and Mecklenburg Superior Court, on the 7th Monday after the 4th Monday in September next, and on the 7th Monday after the 4th Monday in March and September thereafter.

§ 7. Nothing in this act to prevent the trial of any cause in Buncombe Superior Court at the next term.

An Act providing the means by which the United States may obtain scites for Light Houses and Fortifications within this State, and for ceding the jurisdiction thereof to the United States.

§1. Where the owners of land are unknown, or refuse to sell it for this purpose for a fair price, the United States shall, by the attorney of the United States for this district, file with the Governor a suggestion in writing, setting forth their desire to obtain a scite or scites for the erection of fortifications or light-houses, describing the situation and owner or

owners, if known; the Governor shall transmit such suggestion to one of the Judges, who shall issue a Writ of *venire-facias* to the Sheriff of the County in which such scite is situated, commanding him to summon 24 freeholders to attend on the premises on a day certain, from whom he shall draw by lot a jury of 18, entirely unconnected with the owner of the land, who being sworn truly to value and lay off the same (which shall in no case exceed ten acres) shall proceed to view, lay off and value such scite under their hands and seals, and the Sheriff shall deliver the said writ with his return thereon, and the report of the Jury, within ten days to the Register of the County, who shall register the same; and thereupon the United States shall, on payment of the valuation to the party, or if he refuse or be unknown, on payment of the same into the Public Treasury of this State, therein to await the order or demand of the rightful owner, be seized thereof for the purposes mentioned. Such scite to be used within five years after the filing of such petition and to be used continually thereafter for such purposes, otherwise such scite shall revert to the State.

§ 2. So much of an act "to cede to the United States certain lands upon the condition therein mentioned, as cedes Beacon Island and four acres of land at the head of Cape Hatteras," as relates to Beacon Island, is revived and declared in full force, provided a Fort be erected upon said Island by the United States within five years, and kept up forever thereafter.

§ 3. Full and entire sovereignty and jurisdiction over such land as may be laid out and paid for for the above purposes on or before the 1st of Dec. 1814, is ceded to the U. S.

§ 4. The officers of this State not to be debarred from serving any process or levying executions within such cessions to the United States.

LIST OF THE ACTS OF A PRIVATE NATURE.

Regulation of the Militia.

An Act to form the regiment of Infantry in the county of Ashe into a regiment of Riflemen.

To divide the militia of Edgecomb into two Regiments and 4 battalions.

Concerning the second, or Hawfield regiment of militia, in the county of Orange.

Improvement of Navigation.

To incorporate the Clubfoot and Harlow's Creek Canal Company.

To incorporate a company for the purpose of rendering navigable Contentnea Creek.

Roads and Bridges.

To authorise Aaron Alberson, of Pasquotank county, to make a road and cut a ditch on each side of the same.

To authorise Samuel Nixon of Perquimons, to make a road and cut a canal to drain the same.

To amend an act to establish a turnpike road leading from the west end of Mattamuskeet Lake to John Jordan's on Rose Bay, in Hyde county, passed in 1806, and another act passed in 1810 to amend the said act.

To amend an act passed in 1812, incorporating the Washington Toll-bridge Company.

Concerning the turnpike roads in Buncombe county.

Courts, Jurors and Witnesses.

To repeal an act passed in 1810 to make compensation to jurors who may be summoned and serve as talesmen in the counties of Carteret and Richmond so far as respects Richmond county.

Authorising the county court of Wilkes to lay a tax for the purpose of building a jail in said county.

To provide for settlements with the officers, &c. of Montgomery county, and to repeal the law allowing pay to jurors in said county.

To provide for the payment of witnesses in the county of New Hanover.

To authorise the county court of Halifax to transcribe such of the Register books of said county as may be necessary.

To authorise the county court of Edgecomb to lay a tax to defray the expence of building a public jail in said county.

To provide for the building a new jail in the county of Lincoln.

For the payment of jurors attending the superior and county courts in the county of Carteret, and for other purposes.

To authorise the county court of Pasquotank to appoint a public measurer of grain and salt for Elizabeth City.

To amend the 3d section of an act passed in 1809, to empower the county court of Ashe to appoint commissioners of public buildings.

To provide for a settlement with the court officers and other officers of Montgomery county, and to repeal the law allowing pay to jurors of said county.

To authorise and empower the county court of Buncombe to appoint 30 jurors to attend the superior courts of said county.

Support of the Poor.

To raise the poor-tax in the county of Mecklenburg.

To authorise the county court of Bladen to lay and collect a tax for the benefit of the poor of said county.

To repeal an act passed in 1802 to empower the wardens of the poor of

the counties of Martin and Robeson to lay and collect an additional poor tax, so far as the same relates to Martin county.

To establish a poor house in the county of Stokes.

Establishment and Regulation of Towns.

To amend an act passed in 1810 to appoint commissioners to contract with Thomas B Littlejohn for 50 acres of land to erect a town upon, and for other purposes.

To establish and lay off a town on the lands of Shubal Gardner, in the county of Randolph.

To repeal an act passed in 1811 for the better regulation of the town of Trenton, in Jones county and for other purposes.

For the better government of the city of Raleigh.

To amend an act to incorporate the town of Plymouth passed in 1807.

To authorise the commissioners of the town of Lewisburg to perfect the titles of the owners of lots in said town.

To amend an act to authorise the commissioners of the town of Hillsborough to rent out part of the town commons, and for other purposes.

Fisheries.

To repeal an act passed at the last session to prevent any person from obstructing the passags of fish up Oranuse and Sawmill Creeks in Camden county.

Further to regulate the fisheries on Roanoke and Cashie rivers, and to alter and amend an act of 1811.

Separate Elections.

To alter the place of holding a separate election in the county of Tyrrell.

To alter the place of holding a separate election in Stokes county.

To alter the place of holding one of the separate elections in the county of Camden.

To establish in future the mode of elections in the county of Halifax.

To alter and regulate the annual elections in Hyde county.

To establish a separate election in the county of Cumberlard.

Concerning one of the separate election in the county of Orange.

To provide for the manner of conducting separate elections in the county of Pitt, and to repeal the laws now in force for that purpose.

To establish one other separate election in the county of Lincoln, and to alter the places of holding the election hitherto held at Robert Weir's mills in said county.

To establish a separate election in Cabarrus county.

To repeal the third section of an act passed in 1809, for establishing the mode of elections in the county of Currituck, and for other purposes.

To alter the place of holding a separate election in the county of Duplin.

To remove the election from Morrison's old meeting house in Burke county.

To establish two other elections in the county of Columbus.

For the removal of a separate election in the county of Brunswick, and for other purposes.

To alter the place of holding a separate election in the county of Wilkes.

To provide for the manner of conducting elections in the county of Warren, and to repeal the laws now in force for regulating the same.

To establish a separate election in the county of Mecklenburg, and for other puposes

To establish 2 other separate elections in the county of Buncombe, and for other purposes.

Seminaries of Learning.

To authorise the trustees of the Nixonton academy to sell the houses and

improvements on lots No. 49 and 50 in the town of Nixonton.

For the be ter regulation of the Wilmington academy.

To incorparate the trustees of the Williamsborough academy.

To amend an act passed in 1811, to establish an academy on the lands of Thomas B Littlejohn, adjoining the court house in Granville county.

To amend the first and second sections of an act passsd in 1785, for establishing an academy in the town of Kinston.

To establish and incorporate an academy in the town of Lincolnton.

To establish a seminary of learning in the county of Duplin, by the name of Greene academy.

To establish an academy in the town of Tarborough.

To establish an academy in Duplin county, within one mile of the house of Benjamin Hodge's, by the name of Goshen academy

To establish and incorporate an academy in the town of Hillsborough.

To establish a free school in the county of Wayne.

Divorces, &c.

To divorce Polly Mira Poor, of Burke county, from her husband Caleb Poor

To divorce Alexander Crossland, of the county of Warren, from his wife Catharine.

To divorce Stephen Gilmour and his wife Charity, of Cumberland county.

To secure to Elizabeth Jones, wife of Benjamin Jones; Patsey Beckham, wife of Zach. Beckham; and Susannah M'Question, wife of Wm. M'Question, such property as they may hereafter acquire.

To divorce Ann Hyatt, of Burke county, from her husband Seth Hyatt.

To secure to persons therein mentioned such property as they may hereafter acquire.

Arrears of Taxes.

For the relief of Maurice Jones, late sheriff of Hyde county.

To authorise the several persons therein named to collect the arrearages of taxes due them, as late sheriffs of their respective counties.

Miscellaneous.

To compel the sheriff of Brunswick county to ring a bell when he sells property at the court house.

To incorporate a military and literary society in the county of Wayne.

To establish fairs in the town of Salisbury

To amend an act declaring certain water skirts fronting thetown of Smithville, in the county of Brunswick, permanent property.

To incorporate the Female Orphan Society of Fayetteville.

To authorise the commissioners of pilotage for the ports of Wilmington & Beaufort to supply vacancies occasioned by death or resignation.

To incorporate the Salisbury Thespian Society, and for other purposes.

To repeal an act passed in 1796, authorising the members of the Episcopal Church in the town of Newbern, to appoint trustees, and for other purposes, and an act passed in 1807 to amend the act passed in 1796.

To authorise David Dickey, James Bradley, Benjamin Statin and William Dolton to erect gates on the old road leading from Rutherford to Cooper's gap.

To authorise Peter Hairston of Stokes county, and Thomas Henderson of Rockingham county, to erect gates on the public roads leading through their plantations.

To incorporate the Cape Fear Agricultural Society.

To incorporate the North Carolina Bible Society.

For the relief of David Turner of Johnston county.

To restore to credit Henry Morris of Moore county.

To restore to credit Duncan Campbell of Robeson county.